* Together with United States v. Acme Can Co. No. 63

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 62

THE UNITED STATES OF AMERICA, APPELLANT

vs.

CHARLES RESNICK AND JOSEPH RESNICK, PARTNERS TRADING AS L. RESNICK AND SONS

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED MAY 15, 1936

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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1 In United States District Court for the Eastern District of Pennsylvania

No. 6688. June Term, 1935

THE UNITED STATES

vs.

CHARLES RESNICK, AND JOSEPH RESNICK, PARTNERS, TRADING AS L. RESNICK AND SONS

For U. S.: Charles D. McAvoy, Esq.
For Deft.: S. L. Einhorn, Esq.
(Unlawfully selling hampers for fruits and vegetables of a size not authorized by Act of Congress)

Docket entries

1935
Sept. 11—True bill.
Sept. 13—Order of Court to take bail for each defendant in $500 filed.
Sept. 18—Appearance of S. L. Einhorn, Esq., for defendants, filed.
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1936
Mar 6—Argued sur demurrer.
Mar. 11—Opinion Welsh, J., sustaining demurrer to indictment filed.
Apr. 14—Order of Court sustaining demurrer filed.
Apr. 14—Petition for appeal to Supreme Court of the United States filed.
Apr. 14—Assignment of errors filed.
Apr. 14—Order of Court allowing appeal filed.
Apr. 14—Statement of Jurisdiction filed.
Apr. 14—Citation allowed and issued.
Apr. 14—Praecipe for transcript of record filed.
Apr. 22—Affidavit of service of copy of notice of appeal, etc., filed.
Apr. 24—Statement of defendants against jurisdiction filed.

2 In United States District Court

[Title omitted.]

Indictment

Filed Sept. 11, 1935

COUNT I

The Grand Inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their oaths and affirmations, do present that on or about January 25, 1933, at Philadelphia, in the Eastern District of Pennsylvania and within the jurisdiction of this Court, CHARLES RESNICK and JOSEPH RESNICK, partners, doing business under the name of L. RESNICK AND SONS,

having their principal place of business at Philadelphia aforesaid, did knowingly, willfully, and unlawfully sell for fruits and vegetables certain two-quart metal hampers, to wit: 500 two-quart metal hampers, to the Great Atlantic & Pacific Tea Company, Philadelphia, Pennsylvania, which said hampers then and there did not comply with the Act of Congress of May 21, 1928 (45 Stat. 685, known as the United States Standard Container Act of 1928), in that they were not of any standard size authorized by said Act for hampers
3 for fruits and vegetables and did not come within any tolerance established by the Secretary of Agriculture pursuant to said Act for hampers so standardized, and which facts defendants then and there well knew:

Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

COUNT II

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do herein further present that on or about April 1, 1934, at Philadelphia, in the Eastern District of Pennsylvania and within the jurisdiction of this Court, CHARLES RESNICK and JOSEPH RESNICK, partners, doing business under the name of L. RESNICK AND SONS, having their principal place of business at Philadelphia aforesaid, did knowingly, willfully, and unlawfully sell for fruits and vegetables certain two-quart metal hampers to wit: 100 two-quart metal hampers, to Brown Brothers, Philadelphia, Pennsylvania, which said hampers then and there failed to comply with the Act of Congress of May 21, 1928 (45 Stat. 685, known as the United States Standard Container Act of 1928) in that they were not of any standard size authorized by said Act for hampers for fruits and vegetables and did not come within any tolerance established by the Secretary of Agriculture pursuant to said Act for hampers so standardized, which facts said defendants then and there well knew:

4 Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

COUNT III

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do herein further present that on or about May 16, 1935, at Philadelphia, in the Eastern District of Pennsylvania and within the jurisdiction of this Court, CHARLES RESNICK and JOSEPH RESNICK, partners, doing business under the name of L. RESNICK AND SONS, having their principal place of business at Philedelphia aforesaid, did knowingly, wilfully, and unlawfully sell for fruits and vegetables certain two-quart metal hampers, to wit: 25 two-quart metal hampers, to the New Liberty Market, Philadelphia, Pennsylvania, which said hampers then and

there failed to comply with the Act of Congress of May 21, 1928 (45 Stat. 685), in that they were not of any standard size authorized by said Act for such hampers and in that they did not come within any tolerance established by the Secretary of Agriculture pursuant to said Act for hampers so standardized:

Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

5 COUNT IV

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do herein further present that on or about March 1, 1935, at Philadelphia, in the Eastern District of Pennsylvania and within the jurisdiction of this Court, CHARLES RESNICK and JOSEPH RESNICK, partners, doing business under the name of L. RESNICK AND SONS, having their principal place of business at Philadelphia aforesaid, did knowingly, wilfully, and unlawfully sell for containers for fruits and vegetables certain two-quart metal hampers, to wit: 50 two-quart metal hampers, to G. A. Bossler, Philadelphia, Pennsylvania, which said hampers then and there failed to comply with the Act of Congress of May 21, 1928 (45 Stat. 685) known as the United States Standard Container Act, in that they were not of any standard size authorized by said Act for such hampers and in that they did not come within any tolerance established by the Secretary of Agriculture pursuant to said Act for hampers so standardized:

Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

CHARLES D. McAVOY,
United States Attorney.

PHILADELPHIA, PA., September 10, 1935.

7 In United States District Court

[Title omitted.]

Demurrer to indictment

Filed September 23, 1935

AND NOW, to wit: September 23, 1935, come Charles Resnick and Joseph Resnick, partners, trading as L. Resnick & Sons, and by their Attorney, Samuel L. Einhorn, Esq., demurs to the indictment filed and all of the counts thereof, and for grounds of demurrer assigns the following:

1. The sale of two-quart metal hampers for fruits and vegetables, as alleged in Counts I, II, III, and IV of the indictment is not a violation of the Act of May 21, 1928, 45 Stat. 685.

2. The Act of Congress approved May 21, 1928, applies to fruits and vegetables of the capacity set forth therein and does not apply to two-quart metal hampers for fruits and vegetables.

3. The enforcement of the Act of Congress approved May 21, 1928, 45 Stat. 685, would deprive the defendants of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

4. The regulation of hampers for fruits and vegetables insofar as an attempt is made to fix the size of hampers that may be manufactured, shipped, and sold in intrastate commerce is beyond the power of Congress.

8 5. Under the Constitution of the United States Congress is without power to make unlawful the manufacture for sale or shipment or the sale of two-quart hampers for fruits and vegetables in intrastate commerce.

6. Under the constitution of the United States the Congress is without power to fix the size of hampers for fruits and vegetables that may be manufactured for sale or shipment or sold in intrastate commerce.

WHEREFORE, defendants pray that this Indictment and all the counts thereof be dismissed.

SAMUEL L. EINHORN,
Attorney for Defendants.

9 In United States District Court for the Eastern District of Pennsylvania

No. 6688. June Term, 1935

UNITED STATES OF AMERICA

vs.

CHARLES RESNICK AND JOSEPH RESNICK, PARTNERS, TRADING AS L. RESNICK & SONS

Opinion sur demurrer to indictment

Filed March 11, 1936

WELSH, J.: The proceedings herein involve an indictment arising out of the alleged sale by Charles Resnick and Joseph Resnick, trading as L. Resnick & Sons, of certain two-quart metal hampers to the Great Atlantic & Pacific Tea Company, Brown Brothers, The New Liberty Market, and G. A. Bossler, Philadelphia, Pennsylvania. The indictment separately charges the defendant with knowingly, wilfully, and unlawfully selling for fruits and vegetables certain two-quart metal hampers, in violation of the Act of Congress approved May 21, 1928 (45 Stat. 685), known as the United States

Standard Container Act of 1928, in that they were not of any standard size authorized in said Act for such hampers and in that they did not come within any tolerance established by the Secretary of Agriculture pursuant to said Act for hampers so standardized.

10 A demurrer to the indictment was filed alleging that the sale of said hampers was not in violation of the Act and raising certain Constitutional questions.

The Standard Container Act of 1928 is an outgrowth of and supplements the Standard Container Act of 1916 (Public, 248, 64th Congress), which fixed standards for grape baskets, berry baskets, and small till baskets. Prior to the introduction of this Act, and its reference for consideration to the Committee on Agriculture and Forestry, similar bills had been considered for a period of several years. The Act in question provides as follows:

"That the standard hampers and round stave baskets for fruits and vegetables shall be of the following capacities: one-eight' bushel, one-fourth bushel, one-half bushel, five-eight's bushel, one bushel, one- and one-fourth bushels, one-and-one half bushels, and two bushels, which, respectively, shall be of the cubic content set forth in this section. For the purposes of this Act a bushel, standard dry measure, has a capacity of two thousand one hundred and fifty and forty-two one-hundredths cubic inches."

The issue was so framed in this case that the constitutionality of the Act or the interstate character of the business is not involved. The real question is, does the Act of 1928 forbid the use of a metal container or hamper holding two quarts for the purpose of selling fruits or berries? It will be noted that the Act of 1916 provides for small containers for berries, et cetera. The government admits that there is no violation of the Act of 1916 in this case. They base their indictment entirely upon the Act of 1928, which Act makes neither provisions nor penalty for using a container less than one-eighth (4 quarts) of a bushel. The government specifically contends that no one has the right under the Act of 1928 to use any container less than one-eighth of a bushel.

11 At the argument counsel for the government stated that such interpretation was reasonable and that the government was justified in so holding because of the grant of power to the Congress by the Constitution to regulate weights and measures. Government counsel also advance the argument that notwithstanding the admitted fact that the two-quart measure or two-quart hamper in question contained the legal amount of cubic space of one-sixteenth of a bushel, as said bushel is defined in the Act, it was such an unlawful variance from the provisions of the Act as amounted to a breach of the law.

It is difficult to understand how this argument can be accepted as logical. The purpose of the Congress was to provide for a uniform law covering commodities sold in hampers and containers. We are entirely familiar with the confusion that existed before the passage of this Act. Containers of various shapes and sizes, having no spe-

cific relation to a fractional part of a bushel were on the market, leading to confusion, deception and dishonesty. In order to guard against such consequences Congress said by the Act of 1928 that, beginning with a hamper of the size of one-eight of a bushel as the minimum size up to the maximum of a hamper of the size of two bushels, the various hampers should be in accordance with the sizes enumerated in the Act. Congress having done this the government now says in plain english that no one has a right to use a hamper of less than one-eighth of a bushel in size. The Court cannot consider such argument as indicative of what the Congress actually intended and actually legislated upon. While it may not be entirely judicial to say so, the Judge writing this opinion was a member of the Congress when this legislation was passed and by reason of his
12 interest therein followed the matter very closely for some years prior to the Act of 1928 having been passed.

If the construction placed upon this Act by the government and by counsel at the argument is accepted it would mean that packages between the sizes of one quart and four quarts could not be used in the United States today. And this, notwithstanding the admitted fact that the two quart hamper or a two quart hamper contained the full and honest and lawful cubic contents of the fractional part of a legal bushel that it purported to be. Counsel for the government even went further and advanced in support of his contention the theory that the government was justified in so construing the Act of 1928 because the hamper used by this defendant being of metal invaded a prior preempted or monopolized field occupied by the makers and users of wooden hampers. If such view were to be accepted judicially it would mean that the government could not only provide standards of measures for hampers but they would have the power to regulate the manner in which a citizen should do business. Clearly, under the constitutional grant to regulate the standards of weights and measures there could be no such authority, and Congress did not say so in the Act. This is evidently an interpretation placed upon the Act of 1928 that is not warranted.

We consider that this case is of considerable importance, both from the viewpoint of the Department of Agriculture and to the defendant involved. It is of even greater importance to the citizen at large. One of the greatest opportunities for the merchant or producer of any commodity, either manufactured or grown, lies in the field of packing his product in an attractive and an alluring container. As long as the fractional part of the bushel is in ac-
13 cordance with the table of measures, such as pints and quarts is adhered to, if the size of hamper be one or two quarts, honest, lawful cubic capacity, the merchant or dealer, the producer or the farmer has a field which lies open before him under the law to display his good taste, his artistic ability, and his business judgment by selecting the kind of a container or hamper that he desires.

In other words, protection to the public and not restriction of legitimate activities was the aim of the Congress. We feel that this

is what the Congress meant and this is what the Congress said in the Acts of 1928 and 1916. Until Congress itself attempts by legislation to go further neither the Department nor the Courts have a right to do so.

The sustaining of the Demurrer is not based upon the intra-state character of the business. Under the weights and measures provisions of the Constitution interstate business is not required. Nor is the constitutionality of the Act involved. While that question was raised in defendant's brief it was not stressed at the argument. However, inasmuch as it was mentioned in the brief of defendant we are dismissing the matter by saying that we do not consider that there is any merit in such an objection.

Notwithstanding the very able and forceful argument of counsel for the government the Court has reached the above conclusions and the Demurrer is, therefore, sustained.

March 11, 1936.

14 In United States District Court

[Title omitted.]

Order sustaining demurrer

Filed April 14, 1936

AND NOW, to wit: this 14th day of April 1936, it is ORDERED that the Demurrer to the Indictment in the above entitled cause be, and the same is hereby SUSTAINED and defendants discharged without day, to which the plaintiff excepts and the exception is allowed.

By the Court:

(S.) WELSH, *J.*

15 In United States District Court

[Title omitted.]

Assignment of errors

Filed April 14, 1936

Comes the United States of America, plaintiff herein, by Charles D. McAvoy, United States Attorney for the Eastern District of Pennsylvania, and avers that in the record proceedings and judgment herein there is manifest error, and against the just rights of said plaintiff in this, to wit:

1. That the court committed material error against plaintiff in sustaining the demurrer of the defendants Charles Resnick and Joseph Resnick, partners, trading as L. Resnick and Sons, to each and every count of the indictment.

2. That the court committed material error against plaintiff in sustaining said demurrer in holding that the provisions of the Stand-

ard Container Act of May 21, 1928, are inapplicable to the sale of two-quart size hampers for fruits and vegetables.

Wherefore, for all of the above information appearing on the face of the record proceedings and judgment herein plaintiff avers that material error was committed prejudicial to it in this cause and prays that the judgment of the District Court be reversed.

This the 14th day of April, 1936.

Charles D. McAvoy,
(S.) CHARLES D. MCAVOY,
United States Attorney.

[Copy]

16 In United States District Court

[Title omitted.]

Petition for appeal to the Supreme Court of the United States

Filed April 14, 1936

Comes the United States of America, plaintiff herein, and states that on the 11th day of March 1936, a demurrer of the defendants, Charles Resnick and Joseph Resnick, partners, trading as L. Resnick and Sons, to each and every count of the indictment herein was by the court sustained, and the plaintiff feeling aggrieved at the ruling of said district court in sustaining said demurrer, prays that it may be allowed to appeal to the Supreme Court of the United States for a reversal of said judgment and order, and that a transcript of the record in this cause duly authenticated, may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause.

UNITED STATES OF AMERICA
By Charles D. McAvoy,
(S.) CHARLES D. MCAVOY,
United States Attorney,
Eastern District of Pennsylvania.

17 In United States District Court

[Title omitted.]

Order allowing appeal to Supreme Court of the United States

Filed April 14, 1936

This cause having come on this day before the court on the petition of the United States of America, plaintiff in the above entitled cause, praying an appeal to the Supreme Court of the United

States for a reversal of the judgment herein sustaining a demurrer of the defendants, Charles Resnick and Joseph Resnick, partners, trading as L. Resnick and Sons, to each and every count of the indictment in said cause, and that a duly certified copy of the record of said cause to be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said motion, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the clerk of this court, it is, therefore, by the court ordered and adjudged that the plaintiff herein, the United States of America, be, and it is hereby, allowed an appeal from the order and judgment of this court in sustaining the demurrer of the defendants, Charles Resnick and Joseph Resnick, partners, trading as L. Resnick and Sons, to the indictment to the Supreme Court of the United States, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court. It is further ordered that the United States of America be, and it is hereby, permitted a period of forty days from the date hereof in which to file and docket said appeal in the Supreme Court of the United States.

This 14th day of April 1936.

WELSH, *District Judge.*

18 [Citation in usual form showing service on Samuel L. Einhorn omitted in printing.]

19 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed April 14, 1936

To the Clerk of the United States District Court for the Eastern District of Pennsylvania:

The appellant hereby directs that in preparing the transcript of record of this cause in the United States District Court for the Eastern District of Pennsylvania, in connection with its appeal to the Supreme Court of the United States, that you include the following:

1. Indictment.
2. Demurrer.
3. Opinion.
4. Judgment sustaining demurrer.
5. Petition for appeal to the Supreme Court.
6. Statement of jurisdiction of Supreme Court.
7. Assignment of errors.
8. Order allowing appeal.

9. Notice of service on appellee of petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.
10. Citation.
11. Praecipe.

Charles D. McAvoy,
S. CHARLES D. MCAVOY,
United States Attorney, Eastern District of Pennsylvania,
Counsel for Appellant.

20 [Clerk's Certificate to foregoing transcript omitted in printing.]

21 In Supreme Court of the United States

Statement of points relied upon and designation of entire record for printing

Filed May 20, 1936

Pursuant to Rule 13, Par. 9, of this Court the Appellant states that it intends to rely on all of the points in its assignment of errors.

The appellant deems the entire record, as filed in the above entitled cause, necessary for the consideration of the points relied upon.

STANLEY REED, *Solicitor General.*

22 Service acknowledged May 21, 1936.

S. L. EINHORSE,
Counsel for Appellee.

[File endorsement omitted.]

(Endorsement on cover:) File No. 40,589. E. Pennsylvania, D. C. U. S. Term No. 62. The United States of America, appellant vs. Charles Resnick and Joseph Resnick, Partners Trading as L. Resnick and Sons. Filed May 15, 1936. Term No. 62. O. T. 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

In the United States District Court for the Eastern District of Pennsylvania

No. 6688

UNITED STATES OF AMERICA

v.

CHARLES RESNICK AND JOSEPH RESNICK, PARTNERS, TRADING AS L. RESNICK AND SONS

STATEMENT OF JURISDICTION

(Filed Apr. 14, 1936)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682, of the United States Code, otherwise known as the "Criminal Appeals Act", and by Section 345, Title 28, of the United States Code.

B. The statute of the United States, the construction of which is involved herein, is the Standard Container Act of May 21, 1928, 45 Stat. 685,

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Chap. 664 (15 U. S. C., Secs. 257–257i), the pertinent parts of which are as follows:

SEC. 1. That the standard hampers and round stave baskets for fruits and vegetables shall be of the following capacities: One-eighth bushel, one-fourth bushel, one-half bushel, one bushel, one-and-one-fourth bushels, one-and-one-half bushels, and two bushels, which, respectively, shall be of the cubic content set forth in this section. For the purposes of this Act a bushel, standard dry measure, has a capacity of two thousand one hundred and fifty and forty-two one-hundredths cubic inches.

(a) The standard one-eighth bushel hamper or round stave basket shall contain two hundred and sixty-eight and eight-tenths cubic inches.

* * * * *

SEC. 5. That it shall be unlawful to manufacture for sale or shipment, to offer for sale, to sell, to offer for shipment, or to ship, hampers, round stave baskets, or splint baskets for fruits or vegetables, either filled or unfilled, or parts of such hampers, round stave baskets, or splint baskets that do not comply with this Act: *Provided,* That this Act shall not apply to Climax baskets, berry boxes, and till baskets which comply with the provisions of the Act approved August 31, 1916, entitled "An Act to fix standards for Climax baskets for grapes and other fruits and vegetables, and to fix standards for baskets and other containers for small

fruits, berries, and vegetables, and for other purposes" (Thirty-ninth United States Statutes at Large, page 673, and the regulations thereunder). Any individual, partnership, association, or corporation that violates this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding $500.

C. The judgment of the District Court sought to be reviewed was entered on April 14, 1936, and an application for appeal was filed on April 14, 1936, and is presented to the District Court herewith, to wit: On this the 14 day of April 1936.

The indictment in this case is in four separate counts each of which counts is based upon Sections 1 and 5 of the Standard Container Act of 1928 (United States Code, Title 15, Secs. 257 and 257d) and charges in substance that the defendants, Charles Resnick and Joseph Resnick, partners, trading as L. Resnick and Sons, on the days named, did knowingly, wilfully, and unlawfully sell for fruits and vegetables certain two-quart metal hampers which did not comply with the provisions of the Standard Container Act of May 21, 1928, in that they were not of any standard size authorized by the Act for hampers for fruits and vegetables and were not within any tolerances established by the Secretary of Agriculture pursuant to the Act for hampers so standardized. A demurrer to the indictment was filed by the defendants, Charles

Resnick and Joseph Resnick, partners, trading as L. Resnick and Sons, and at the hearing thereof the court construed the provisions of the statute as being inapplicable to the sale of two-quart size hampers for fruits and vegetables. In its written opinion, the court held that the Act makes neither provision nor penalty for using a container of less than one-eighth (four quarts) of a bushel. The court further held that the constitutionality of the Act was not involved and that the sustaining of the demurrer was not based on the intra-state character of the business.

The following decisions are believed to sustain the jurisdiction of the Supreme Court:

United States v. *Heinze,* 218 U. S. 532.
United States v. *Hastings,* 296 U. S. 188.
United States v. *Bitty,* 208 U. S. 393, 399.
United States v. *Keitel,* 211 U. S. 370.

Respectfully submitted.

CHARLES D. MCAVOY,
United States Attorney.

U. S. GOVERNMENT PRINTING OFFICE: 1938

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67097—36——1

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. ———

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES RESNICK AND JOSEPH RESNICK, PARTNERS, TRADING AS L. RESNICK & SONS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

The United States District Court for the Eastern District of Pennsylvania in its written opinion dated March 11, 1936, held that the indictment in the instant case charging that the appellees unlawfully sold certain two-quart metal hampers for fruits and vegetables, in violation of the Standard Container Act of May 21, 1928, charged no offense against the laws of the United States on the ground that such Act does not apply to the manufacture for sale or sale of hampers for fruits and vegetables of a size less than one-eighth of a bushel

(four quarts). The order of the court sustaining the demurrer was made and entered April 14, 1936.

Thereafter on the same day, April 14, 1936, the United States filed in the District Court and presented to the District Judge a petition for appeal, an assignment of errors, and a statement of jurisdiction. While the petition for appeal recited that "on the 11th day of March 1936, a demurrer * * * was by the court sustained", and prayed that the United States be allowed to appeal to this Court "for a reversal of said judgment and order", the statement of jurisdiction, submitted therewith, in paragraph C recited that the judgment sought to be reviewed was entered April 14, 1936, and the assignment of errors prayed that "the judgment of the District Court be reversed." The order allowing the appeal granted an appeal from the "order and judgment of this court" in sustaining the demurrer of the appellees. The only order or judgment of the court sustaining the appellees' demurrer is that of April 14, 1936. The order allowing the appeal recites that it was based not only on the petition for appeal but also on the jurisdictional statement which, under Rule 12, paragraph 1, of the Rules of this Court, was presented to the District Judge simultaneously with the petition for appeal, and which, as stated, correctly recited the date of the judgment or order of the District Court sustaining the demurrer.

I

The Criminal Appeals Act (c. 2564, 34 Stat. 1246; U. S. C., Title 18, Sec. 682) provides that "The writ of error [now appeal] in all such cases shall be taken within thirty days after the decision or judgment has been rendered." The appellees move to dismiss the present appeal on the ground that it was not taken within thirty days from the rendition of the "decision" sustaining the demurrer. It is their contention that such "decision" was rendered by the District Court in its opinion of March 11, 1936, the order or judgment of April 14, 1936, being characterized as an order "sustaining the demurrer a second time." In support of their contention the appellees point to the fact that the Government in its petition for appeal prayed for a reversal of the "judgment and order" made on March 11, 1936.

The Government's petition for appeal was filed and presented to the District Judge subsequent to the filing of the order of the District Court sustaining the demurrer on April 14, 1936. Under these circumstances we think that the reference in the petition for appeal to the date of the judgment and order sustaining the demurrer as "March 11, 1936" may be treated as mere surplusage, as the petition for appeal, without reciting the date of the judgment or order sustaining the demurrer, need only have sought the allowance of an appeal from the order or judgment which had already been en-

tered at the time the petition for appeal was filed and presented to the District Judge. (Cf. *Larkin Packer Co.* v. *Hinderliter Tool Co.*, 60 F. (2d) 491, 495 (C. C. A. 10th) and cases cited.)

The only question presented therefore is whether the opinion of the District Judge on March 11, 1936, may be considered as a "decision" sustaining a demurrer within the meaning of the Criminal Appeals Act, so that the Government was required within thirty days after its rendition to take its appeal.

An opinion is obviously not a "decision" for appellate purposes. It is merely a statement of reasons for or in explanation of a decision. *Albany Perforated Wrapping-Paper Co.* v. *John Hoberg Co.*, 109 Fed. 589, 591 (C. C. A. 7th); see also *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451, 456. In the Federal courts an opinion is strictly not a part of the record proper, but is included in the transcript certified by the clerk of the lower court to the appellate court simply because its inclusion is ordinarily required by the rules of the appellate court. See Rule 10, paragraph 2 of the Rules of this Court; *England* v. *Gebhardt*, 112 U. S. 502, 506; *Childs* v. *Williams*, 212 Fed. 151, 152 (C. C. A. 8th); *Mutual Reserve Fund Life Ass'n* v. *DuBois*, 85 Fed. 586 (C. C. A. 9th), certiorari denied, 171 U. S. 688; *North American Loan & Trust Co.* v. *Colonial & U. S. Mortg. Co.*, 83 Fed. 796, 803 (C. C. A. 8th); *Nashua &*

Lowell R. Corp. v. *Boston & Lowell R. Corp.*, 61 Fed. 237, 240–241 (C. C. A. 1st); *Hoe* v. *Kahler*, 27 Fed. 145 (C. C., S. D. N. Y.).

It would seem therefore that in granting an appeal to the Government under the Criminal Appeals Act when taken within thirty days of the rendition of a "decision or judgment" sustaining a demurrer, Congress must have had in mind either an *order* or a *judgment* sustaining a demurrer and must have intended that the thirty-day period should run from the entry or filing of the order or judgment sustaining the demurrer. Such a construction brings the Criminal Appeals Act in harmony with the other statutes governing appellate review in the Federal courts. A number of these statutes are referred to in the case of *In re Hurley Mercantile Co.*, 56 F. (2d) 1023, 1024–1025 (C. C. A. 5th), certiorari denied *sub nom. Atascosa County State Bank* v. *Coppard*, 286 U. S. 555, and the court after alluding to the variation in language of these statutes said (p. 1025):

> We think Congress did not intend to establish a varying standard for beginning to count the time for appeal, but intended that the time should run only from the perfecting of the judgment or order as final by its filing with the clerk. Such was the ruling made touching appeals to the Supreme Court in *Seymour* v. *Freer*, 5 Wall. 822, 18 L. Ed. 564; *Rubber Co.* v. *Goodyear*, 6 Wall. 153, 18 L. Ed. 762; *Polleys* v. *Black River*

Co., 113 U. S. 81, 5 S. Ct. 369, 28 L. Ed. 938. In a statute relating to judgments reviewable in the Supreme Court, the term "rendered" was held to refer to such judgments as had attained appealable perfection. *Yznaga del Valle* v. *Harrison,* 93 U. S. 233, 23 L. Ed. 892. General Order in Bankruptcy XXXVI (11 USCA § 53) fixed the time for appeals in bankruptcy as "within thirty days after the judgment or decree," and this was said to mean thirty days after its entry. *Conboy* v. *First National Bank,* 203 U. S. 141, 27 S. Ct. 50, 51 L. Ed. 128. Statutes regulating appeals are remedial and should have a liberal construction in furtherance of the right of appeal. 2 R. C. L. "Appeal and Error," § 6. We hold this appeal taken within thirty days from the filing with the clerk of the judgment appealed from to be in time.

See also *Williamson* v. *Chicago Mill & Lumber Co.,* 59 F. (2d) 918, 919 (C. C. A. 8th); *Herrick* v. *Cutcheon,* 55 Fed. 6 (C. C. A. 1st); Hughes, *Federal Practice,* Vol. 8, pp. 448–449.

For the reasons stated we respectfully submit that the motion to dismiss should be denied.

II

The District Court in sustaining the appellees' demurrer held that the Standard Container Act of May 21, 1928 (U. S. C., Title 15, Secs. 257–257i), was inapplicable to the manufacture for sale or sale

of two-quart size hampers for fruits and vegetables, its position being that the Act did not purport to fix the standards for any hampers of a capacity of less than one-eighth of a bushel. The appellees, as an alternative to their motion to dismiss, move to affirm the decision of the court below on the ground that its construction of the Act was manifestly correct and that such contruction was supported by the decision of this Court in *Pacific States Co.* v. *White,* 296 U. S. 176, 183, when it said, in referring to the statute, that it "deals solely with hampers, round stave, and splint baskets of capacity not less than one-eighth bushel."

We think that a brief analysis of the pertinent sections of the statute will indicate that the instant appeal presents a substantial question as to the construction of the statute. Section 1 of the Act fixes the standards for hampers and round stave baskets for fruits and vegetables and provides that these hampers and round stave baskets shall be of nine designated capacities which range in size from one-eighth of a bushel to two bushels, and it then specifies the cubic contents of each one of the standard hampers and round stave baskets. Section 2 deals with splint baskets for fruits and vegetables in a similar manner. Section 3 permits the Secretary of Agriculture in his regulations under the Act to prescribe "such tolerances as he may find necessary to allow in the capacities for hampers, round stave baskets, and splint baskets

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set forth in sections 1 and 2 of this Act in order to provide for reasonable variations occurring in the course of manufacturing and handling." Section 4 provides specifically "That no manufacturer shall manufacture hampers, round stave baskets, or splint baskets for fruits and vegetables unless the dimension specifications for such hampers, round stave baskets, or splint baskets shall have been submitted to and approved by the Secretary of Agriculture, who is hereby directed to approve such specifications if he finds that hampers, round stave baskets, or splint baskets for fruits and vegetables made in accordance therewith would not be deceptive in appearance and *would comply with the provisions of sections 1 and 2 of this Act.*" (Italics ours.) And Section 5 provides "That it shall be unlawful to manufacture for sale or shipment, to offer for sale, to sell, to offer for shipment, or to ship, hampers, round stave baskets, or splint baskets for fruits or vegetables, either filled or unfilled, or parts of such hampers, round stave baskets, or splint baskets that do not comply with this Act: *Provided,* That this Act shall not apply to Climax baskets, berry boxes, and till baskets which comply with the provisions of the Act approved August 31, 1916, entitled 'An Act to fix standards for Climax baskets for grapes and other fruits and vegetables, and to fix standards for baskets and other containers for small fruits, berries, and vegetables, and for other purposes'

(Thirty-ninth United States Statutes at Large, page 673), and the regulations thereunder."

It seems to us that it was the purpose of Congress in this statute to allow the manufacture for sale or sale only of hampers, round stave and splint baskets of the capacities specified in Sections 1 and 2 of the Act. This is emphasized by the provision in Section 3 that the Secretary of Agriculture shall approve only such hampers, round stave and splint baskets which "would comply with the provisions of sections 1 and 2 of this Act." In other words it would seem that the Act permits the use only of such hampers, round stave and splint baskets for fruits and vegetables as are specified in the Act. As the Act does not permit a hamper of a minimum capacity of less than one-eighth of a bushel, or four quarts, its effect is to exclude hampers of two quarts, such as those sold by the appellees.

This construction also finds support in the exception contained in Section 5 to the effect that the Act shall not apply to Climax baskets, berry boxes, and till baskets which comply with the provisions of the earlier Standard Baskets and Containers Act of August 31, 1916 (U. S. C., Title 15, Secs. 251–256). The first section of that Act fixes the standards for Climax baskets for grapes and other fruits and vegetables. This section permits three sizes of Climax baskets, 2, 4, and 12 quarts, and fixes the dimensions of each size. The section

also contains certain special provisions with reference to Climax baskets for mushrooms. The second section of that Act directs that the standard basket or other container for small fruits, berries, and vegetables shall be of certain capacities (dry one-half pint, dry pint, dry quart, or multiples of the dry quart), and fixes the cubic contents of each of the standard containers. The section does not, however, attempt to prescribe either the form or the dimensions of the standard containers. It will be observed that neither of these two sections deals with hampers, round stave, or splint baskets as such. While it would seem that there was no necessity in the later Act of May 21, 1928, specifically to exclude from its operation Climax baskets, berry boxes, and till baskets which comply with the earlier Act of August 31, 1916, as such containers were undoubtedly not known in the industry as hampers,[1] round stave baskets or splint baskets, the exception was evidently inserted in the later Act as a precautionary measure so as to insure that nothing therein contained should in any wise be

[1]A "hamper" is defined by the Secretary of Agriculture in his regulations of June 1, 1933, under the Act of 1928, as follows:

> A container, circular, elliptical, or polygonal at top and/or bottom, the top diameter of which is somewhat greater than the bottom and usually less than the depth, having slatted or solid sides ventilated or nonventilated, and a fabricated or solid bottom which may be loose or fixed in place, or formed by a continuation of the sides.

construed as forbidding the manufacture for sale or sale of Climax baskets, berry boxes, and till baskets when they comply with the provisions of the earlier Act. Thus construed, the two Acts are harmonious in operation. The Act of May 21, 1928, deals exclusively with hampers, round stave baskets, and splint baskets for fruits and vegetables, and permits the manufacture for sale or sale of these types of containers only when they are of the capacities specified in that Act. The Act of August 31, 1916, deals with Climax baskets, berry boxes, and till baskets, or similar containers (other than hampers, round stave baskets, and splint baskets), and permits the manufacture for sale or sale of such types of containers only when they are of the dimensions or capacities specified in that Act. The two Acts are consequently mutually exclusive, each dealing with its own classes of containers and forbidding the manufacture of any container of the classes to which it relates which do not meet its specifications.

That Congress intended by the Act of 1928 to permit only hampers having a minimum capacity of one-eighth of a bushel or a maximum capacity of two bushels is emphasized by a brief consideration of the legislative history of that Act. Prior to the passage of the Act of 1928, there were, as stated in the House Report of the Committee on Coinage, Weights, and Measures (H. Rep. 1129, 70th Cong., 1st Sess., p. 2), about forty different

sizes of hampers, ranging in capacity from one quart to fifty quarts. The consequences of this wide range in sizes were, as the House Report reveals (p. 2), deception of consumers, unfair competition between manufacturers, confusion in the bases for market quotations, and unnecessary manufacturing processes arising from the necessity of producing a large variety of sizes. It was to remedy the evils resulting from the unnecessary range in sizes that the Act of 1928 was passed. Thus, it was stated in the House Report (pp. 1, 2) on the measure that:

> The object and purpose of this legislation is to standardize certain sizes of hampers and baskets used in the marketing of fruits and vegetables, and to make it unlawful to either manufacture, sell, or offer for sale containers not corresponding with those herein mentioned.
>
> * * * * *
>
> The main reasons and purposes for the enactment of this measure may be more fully set forth as follows:
>
> * * * * *
>
> *What it does.*—1. *Establishes standard capacities for hampers, round stave baskets, and splint baskets.*
>
> 2. Requires manufacturers to submit statement of dimension specifications to Secretary of Agriculture for approval.
>
> 3. Requires Secretary of Agriculture to approve of such specifications *if a basket made according to them will conform to one*

> *of the standard capacities set up in the bill* and is not deceptive in appearance.
>
> 4. *Forbids manufacture, sale, or shipment of nonstandard containers.* (Italics ours.)

See also S. Rep. 303, 70th Cong., 1st Sess.; H. Rep. 70, 67th Cong., 1st Sess.; H. Rep. 852, 66th Cong., 2d Sess.

It is evident, therefore, from the legislative history that it was the purpose of Congress to prevent the manufacture for sale or sale of any hamper not conforming to any one of the nine sizes which were prescribed as standard by the Act, excluding as a consequence hampers having a minimum capacity of less than one-eighth of a bushel or a maximum capacity of more than two bushels.

We do not think that the decision of this Court in the *Pacific States Co.* case can be said to be conclusive in the present case. While the sentence from the opinion in that case upon which the appellees rely lends some support to its contention, we do not believe that when that case is analyzed it can fairly be said that this Court's mind was directed to the question which we have here presented, i. e., whether the Standard Container Act of May 21, 1928, applies to the manufacture for sale or sale of *hampers* for fruits and vegetables having a capacity of less than one-eighth bushel.

The question presented in the *Pacific States Co.* case was the validity of an order of a State Department of Agriculture fixing as the standard

containers for raspberries and strawberries pint hallocks of certain dimensions. The plaintiff who assailed the regulation was the manufacturer of a berry container which was neither a hallock nor a hamper but a form of container known as a tin top or metal rim container, and it contended among other things that the standard container prescribed by the State order was in conflict with the Standard Container Act of May 21, 1928. As this Act, however, deals only with hampers, round stave and splint baskets for fruits and vegetables and specifically excepts from its provisions Climax baskets, berry boxes, and till baskets which comply with the Standard Baskets and Container Act of August 31, 1916 (U. S C., Title 15, Sec. 257d), it is evident that the statute had no application to berry containers either of the type referred to in the order of the State Department of Agriculture or of the type manufactured and sold by the plaintiff. The Court itself in the sentence upon which the appellees rely pointed out this distinction when it said that the statute "deals solely with hampers, round stave, and splint baskets." In going further and stating that the statute dealt solely with containers of the character mentioned when "of capacity not less than one-eighth bushel", the Court was not required, in view of the contention before it or the type of containers involved, to give consideration to the question whether the Act prohibited the manufac-

ture for sale or the sale of *hampers* of a capacity less than one-eighth of a bushel.

As a matter of fact, it would seem that the controversy involved in the *Pacific States Co.* case with reference to the conflict between the State order and standards fixed by the legislation of Congress centered principally upon the applicability of Section 2 of the Standard Baskets and Container Act of August 31, 1916, *supra* (U. S. C., Title 15, Sec. 252), which deals with containers ~~of any type~~ for small fruits, berries, and vegetables, *without specifically mentioning the form thereof*, for the Court after the sentence relied upon by the appellees in the present case, goes on at some length to point out the inapplicability of that section because it fixed merely the cubic contents of the containers and made no reference to the dimensions or form thereof, thereby leaving to the individual States the adoption of the standards in these respects if deemed necessary.

For the reasons stated we respectfully submit that the motion to affirm should be denied.

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MAY 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 62

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES RESNICK AND JOSEPH RESNICK, PARTNERS, TRADING AS L. RESNICK AND SONS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 4–7) has not yet been reported.

JURISDICTION

The order of the District Court sustaining the demurrer to the indictment was entered April 14, 1936 (R. 1, 7). The appeal to this Court was applied for and allowed on the same day (R. 7–8). The jurisdiction of this Court is invoked under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and under Section 238 of the Judicial Code as amended by the

Act of February 13, 1925 (U. S. C., Title 28, Sec. 345). On June 1, 1936, this Court postponed further consideration of the question of its jurisdiction in this case to the hearing of the case on the merits.

QUESTIONS PRESENTED

1. Whether the filing of an opinion by the court below in sustaining a demurrer to the indictment was the rendition of its "decision or judgment" within the meaning of the Criminal Appeals Act, so that an appeal was required to be taken within thirty days thereafter rather than within thirty days after the entry of the order sustaining the demurrer.

2. Whether the sale of two-quart hampers for fruits and vegetables is in contravention of the Standard Container Act of 1928.

STATUTES INVOLVED

The Standard Container Act of 1928, c. 664, 45 Stat. 685 (U. S. C., Title 15, Secs. 257–257(i)), together with the pertinent provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1245 (U. S. C., Title 18, Sec. 682), are printed in Appendix A, *infra,* pp. 35–41.

STATEMENT

On September 11, 1935, the appellees were indicted in the United States District Court for the Eastern District of Pennsylvania on four counts charging violations of the Act of Congress of May 21, 1928, otherwise known as the Standard Con-

tainer Act of 1928, each count alleging an intrastate sale of certain two-quart metal hampers for fruits and vegetables which were not of any standard size authorized by the Act and which did not come within any tolerance established by the Secretary of Agriculture pursuant to the Act for hampers so standardized (R. 1–3).

The appellees demurred to the indictment (R. 3–4) on the grounds that the sale of two-quart hampers for fruits and vegetables was not a violation of the Act, and that the Act was unconstitutional because it infringed the due process clause of the Fifth Amendment, and because Congress was without power under the Constitution to fix the size of hampers for fruits and vegetables that may be manufactured for sale or shipment or sold in intrastate commerce.

The District Court on April 14, 1936, ordered that the demurrer be sustained (R. 7) on the sole ground, as disclosed by its opinion of March 11, 1936, that the Act does not forbid the sale of two-quart hampers for fruits and vegetables (R. 4–7). Concerning the other questions presented by the demurrer, the court said that (R. 5):

> The issue was so framed in this case that the constitutionality of the Act or the interstate character of the business is not involved,

and that (R. 7):

> The sustaining of the Demurrer is not based upon the intra-state character of the

> business. Under the weights and measures provisions of the Constitution, interstate business is not required. Nor is the constitutionality of the Act involved. While that question was raised in defendant's brief, it was not stressed at the argument. However, inasmuch as it was mentioned in the brief of defendant, we are dismissing the matter by saying that we do not consider that there is any merit in such an objection.

The Government on April 14, 1936, the day that the order sustaining the demurrer was entered, petitioned for an appeal (R. 8), filing with its petition an assignment of errors (R. 7–8) and a statement of jurisdiction pursuant to Rule 12 of this Court. On the same day the District Court allowed the appeal (R. 8–9). Thereafter a statement opposing jurisdiction was filed below by the appellees, in which they moved to dismiss the appeal on the ground that the appeal was not taken in time because not applied for within thirty days after the rendition of the opinion of the District Court on March 11, 1936, and in which they also, in the event that their motion to dismiss was denied, moved to affirm on the ground that the question of the construction of the statute was not substantial because the District Court had given the same construction to the statute as had this Court in *Pacific States Co.* v. *White,* 296 U. S. 176. In reply, the Government filed a brief in opposition to the motion to dismiss or affirm. On June 1, 1936, this Court postponed further consideration of the question of its jurisdiction to the hearing of the case on the merits.

SPECIFICATION OF ERRORS TO BE URGED

1. The District Court erred in holding that the provisions of the Standard Container Act of 1928 are inapplicable to the sale of two-quart size hampers for fruits and vegetables.

2. The District Court erred in sustaining the demurrer to the indictment.

SUMMARY OF ARGUMENT

I

The Criminal Appeals Act allows an appeal to be taken "within thirty days after the *decision or judgment* has been rendered." (Italics ours.) The appeal in this case was taken within thirty days after the order sustaining the demurrer to the indictment was entered, but not within thirty days after the court's opinion was rendered. The only reasonable construction which can be given to the words "decision" and "judgment", as they appear in the Criminal Appeals Act, is that they were intended to be used synonymously, that they do not refer to an opinion, that they relate to what is technically known as a judgment which has attained an appealable status through entry by the clerk in the records of the court, and that the appeal must consequently be taken from this judgment. It is only by such a construction of the words "decision or judgment" that they are brought in harmony with the well-recognized and long established scheme of appellate review in the Federal courts. As the

appeal was taken within thirty days after the judgment of the District Court sustaining the demurrer was entered, it was taken in time.

II

The court below was in error in construing the Standard Container Act of 1928 as permitting the sale of two-quart hampers for fruits and vegetables. An analysis of the statute establishes that Congress clearly intended to permit the sale only of the nine standard sizes of hampers which it prescribed. As the two-quart size hamper was not made standard, its sale was forbidden. This interpretation of the statute is supported by its legislative history, a consideration of the evils which the statute was intended to remedy, and the contemporaneous administrative construction of the officials charged with its enforcement.

ARGUMENT

I

THE APPEAL WAS TAKEN WITHIN THE TIME PRESCRIBED BY THE CRIMINAL APPEALS ACT

On June 1, 1936, this Court directed that further consideration of the question of its jurisdiction in this case be postponed to the hearing of the case on the merits. The only jurisdictional question raised by the appellees in their statement opposing jurisdiction was whether the appeal was taken within the time prescribed by the Criminal Appeals Act.

That statute, after granting the Government the right to a direct review by this Court on writ of error (now appeal)[1] of certain decisions or judgments, including a decision or judgment of the character involved herein, provides that "The writ of error [now appeal] [1] in all such cases shall be taken within thirty days after the *decision* or *judgment* has been rendered." (Italics ours.)

The record in the instant case shows that while the opinion of the District Court was handed down on March 11, 1936 (R. 1, 4–7), its order sustaining the demurrer and discharging the appellees was not filed until April 14, 1936 (R. 1, 7). The Government's appeal was petitioned for and allowed on the same day (R. 7–9).

It is obvious that the Government's appeal was in time if the court's order of April 14, 1936, sustaining the demurrer was its "decision or judgment" within the meaning of the Criminal Appeals Act.

In their statement opposing jurisdiction (pp. 2, 3) the appellees contend that the "decision" in

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[1] Writs of error were abolished by Section 1 of the Act of January 31, 1928, c. 14, 45 Stat. 54 (U. S. C., Title 28, Sec. 861a), but by the Act of April 26, 1928, c. 440, 45 Stat. 466, amending Section 2 of the former Act, it was provided that:

> The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error. (U. S. C., Title 28, Sec. 861b.)

the case was rendered on March 11, 1936, when the court handed down its opinion. The order of April 14, 1936, is characterized as one "sustaining the demurrer a second time", and it is said with respect to that order that it did not have the effect of extending the time within which the appeal must be taken. As the appellees end their argument at this point and do not discuss the question as to when a "judgment" may be considered as having been rendered within the meaning of the Criminal Appeals Act, it would seem that they limit their argument to the proposition that at least where an opinion has been filed in a case covered by the Act, the Government is required to take its appeal within thirty days after such opinion has been rendered and may not avail itself for appellate purposes of the subsequent formal judgment. This contention, we submit, is without merit.

It is our position that the only reasonable construction which can be given to the words "decision" and "judgment" as they appear in the Criminal Appeals Act is that they were intended to be used synonymously, that they do not refer to an opinion, that they relate only to what is technically known as a judgment which has attained an appealable status through entry by the clerk in the records of the court, and that the appeal must consequently be taken from this judgment. It is only by such a construction of the words "decision or

judgment" that they are brought in harmony with the well recognized and long-established scheme of appellate review in the Federal courts.

Beginning with the Act of March 3, 1891, establishing the Circuit Courts of Appeals and running through the various reenactments and modifications of that statute by the Judicial Code and the Judiciary Act of February 13, 1925, Congress has consistently provided, with certain exceptions not here material, that the appellate jurisdiction of the Circuit Courts of Appeals should extend to "final *decisions* in the District Courts. (Italics ours.) (Act of March 3, 1891, c. 517, 26 Stat. 826, 828; Judicial Code, Sec. 128; Judicial Code, Sec. 128, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C., Title 28, Sec. 225).) In *Ex parte Tiffany,* 252 U. S. 32, 36, this Court specifically declared that

> the words: "final *decisions* in the district courts" mean the same thing as "final *judgments* and decrees" as used in former acts regulating appellate jurisdiction. Loveland on Appellate Jurisdiction of Federal Courts, Sec. 39. This conclusion is amply sustained by the decisions of this court. (Italics ours.)

See also *Harrington* v. *Holler,* 111 U. S. 796, 797; *McLish* v. *Roff,* 141 U. S. 661, 665.

Under this legislation the Federal courts have on several occasions been required to determine

whether opinions and other rulings prior to formal judgment may be considered as appealable judgments or decrees. In *Williamson* v. *Chicago Mill & Lumber Corporation,* 59 F. (2d) 918, 919 (C. C. A. 8th), an opinion was filed which stated the grounds of the court's determination, and concluded by saying that findings of fact, conclusions of law, and a decree might be prepared and submitted for approval. The court held that this opinion could not be treated as a decree for appeal purposes. A similar holding was made by the Circuit Court of Appeals for the Seventh Circuit in *Rardin* v. *Messick,* 78 F. (2d) 643, 644, 646. In *United States* v. *Long Branch Distilling Co.,* 262 Fed. 768 (C. C. A. 5th), it was held that an appeal did not lie from a mere verdict of a jury on which no judgment had been entered. In *Herrick* v. *Cutcheon,* 55 Fed. 6, the Circuit Court of Appeals for the First Circuit, in a per curiam decision, stated:

> Whatever may be the practice of the circuit court as to drawing out decrees before they become effective as such, it is plain that the docket entry in this case, containing only the words, "Opinion—Decree for complainants," does not constitute a decree for an injunction required to give this court jurisdiction, nor can the docket entry be aided for that purpose by reference to the opinion. The appeal was taken prematurely, and is dismissed, with costs.

See also *Rubber Co.* v. *Goodyear,* 6 Wall. 153, 155.

Perhaps the best discussion as to whether an opinion, even though it contains an order for judgment, may be considered as a judgment is found in *G. Amsinch & Co.* v. *Springfield Grocer Co.*, 7 F. (2d) 855 (C. C. A. 8th). In that case, which involved the question whether an opinion was a judgment which could not be set aside after the term, the trial court filed a "memorandum on final hearing" in which it reviewed the evidence and made certain findings of fact and conclusions of law to the effect that the plaintiff was entitled to recover a stated sum of money with interest thereon at 6% per annum from a stated date. This memorandum concluded with the words "Judgment accordingly", and was signed by the District Judge and recorded in the Law Record of the court. In a well-considered opinion the court held that the memorandum was not a judgment, saying:

> At the close of its original memorandum opinion the court said, "Judgment accordingly," and these are the words relied on by plaintiff to show a final determination of the matter. * * *
>
> A judgment is the final sentence of the law upon the matter at issue in the cause as presented by the record. It is the final determination of the rights of the parties in an action. *In re Moseley et al.*, 17 Fed. Cas. 886, No. 9,868; *Davidson* v. *Smith*, 7 Fed. Cas. 38, No. 3,608; *Black on Judgments*, § 115; *State* v. *Klein*, 140 Mo. 503, 41 S. W. 895;

4 Words and Phrases, First Series, p. 3829; *Judge* v. *Powers,* 156 Iowa 251, 136 N. W. 315, Ann. Cas. 1915B, 280; 23 Cyc. 665; *McTavish* v. *Great Northern Ry. Co.,* 8 N. D. 333, 79 N. W. 443; *Oklahoma City* v. *McMaster,* 196 U. S. 529, 25 S. Ct. 324, 49 L. Ed. 587; *Butt* v. *Herndon,* 36 Kan. 370, 13 P. 580. A final judgment leaves no further judicial act to be performed. *The opinion of the court is not a judgment.* It is merely the announcement of the reason or reasons for the conclusion the court has reached. The recording of such opinion in the book where judgments are recorded does not make it a judgment.

An order for a judgment is not a judgment. In 33 Corpus Juris, p. 1055, is a very clear statement on this subject as follows: "An order merely directing or authorizing the entry of judgment in the case does not constitute a judgment; to have this effect it must be so worded as to express the final sentence of the court on the matters contained in the record and to end the case at once, without contemplating any further judicial action." In 15 Ruling Case Law, p. 570, the distinction between judgments and findings and opinions is stated as follows: "Neither the verdict of a jury nor findings of the court constitute a judgment. *Nor do the conclusions of law stated by the judge during or after the trial of the case nor his opinion upon matters submitted, whether oral or in writing, necessarily form a part of the judgment proper.* It has been cor-

rectly said that *the decision of a court constitutes its judgment* while the opinion represents merely the reasons for that judgment." See, also, *Shepard* v. *Pettit and Another, Adm'rs., etc.,* 30 Minn. 119, 14 N. W. 511; *Bode* v. *New England Investment Co.,* 1 N. D. 121, 45 N. W. 197; *McTavish* v. *Great Northern Ry. Co.,* 8 N. D. 333, 79 N. W. 443; *United States* v. *Gomez,* 68 U. S. (1 Wall.) 690, 17 L. Ed. 677; 33 Corpus Juris, p. 1055; *Kennedy* v. *Citizens' National Bank,* 119 Iowa, 123, 93 N. W. 71; *Child* v. *Morgan et al.,* 51 Minn. 116, 52 N. W. 1127; 7 R. C. L., p. 1015.

The memorandum claimed to constitute a judgment does not purport to be the final judicial act. It does not adjudge or order that plaintiff shall recover any specified amount of money; it provides that there *shall be* a judgment according to the opinion of the court—not that there *is* a judgment by the instrument filed. No execution could have been issued thereon—no appeal taken therefrom. It was merely an order for a judgment. (Italics ours.)

See also *Puget Sound Co.* v. *King County,* 264 U. S. 22, 25.

As the decision in the *Springfield Grocer* case points out, the reason why an opinion may not be considered as the judgment or decision of a court for appellate purposes is that it is not the final judicial act of the court, but merely an announcement of the reasons for the court's judgment or

decision. See also *Williams* v. *Norris,* 12 Wheat. 117, 118; *Durant* v. *Essex Company,* 7 Wall. 107, 110; *Thompson* v. *Maxwell Land Grant Co.,* 168 U. S. 450, 456; *Albany Perforated Wrapping Paper Co.* v. *John Hoberg Co.,* 109 Fed. 589, 591 (C. C. A. 7th); *Patting* v. *Spring Valley Coal Co.,* 98 Fed. 811, 812 (C. C. A. 7th); *Fairbanks* v. *Amoskeag Nat. Bank,* 32 Fed. 572, 573 (C. C. N. H.).[2] No matter how erroneous the reasoning employed by a court in its opinion may be, its judgment, if correct, will nevertheless be affirmed. See *Indiana Farmer's Guide Pub. Co.* v. *Prairie Farmer Pub. Co.,* 293 U. S. 268, 281; *Mills Novelty Co.* v. *Monarch Tool & Mfg. Co.,* 49 F. (2d) 28 (C. C. A. 6th), certiorari denied, 284 U. S. 662. While the opinion is, of course, of aid in ascertaining the reasons for a decision or judgment, it has been often held that it does not constitute a part of the record proper in a Federal court, its inclusion in the transcript certified to the appellate court occurring simply because required by the rules of that court. See Rule 10, paragraph 2 of the Rules of this Court; *England* v. *Gebhardt,* 112 U. S. 502, 506; *Childs* v. *Williams,* 212 Fed. 151, 152 (C. C. A. 8th); *Mutual Reserve Fund Life Ass'n* v. *DuBois,* 85 Fed. 586

[2] The following state decisions also hold that opinions are not appealable judgments or decisions. *Van Gorden* v. *Schuller,* 192 Iowa 853, 858; *Wittemann Bros.* v. *Forman Bottling Co.,* 165 N. Y. Supp. 811, 812; *In Re Beam,* 93 N. J. Eq. 593, 595; *Threadgill* v. *Dixie Industrial Co.,* 202 Ala. 309; *Ollason* v. *Glasscock,* 26 Ariz. 193, 199. See also *Ogata* v. *Ogata,* 30 Hawaii 620, 622.

(C. C. A. 9th), certiorari denied, 171 U. S. 688; *North American Loan & Trust Co.* v. *Colonial & U. S. Mortg. Co.,* 83 Fed. 796, 803 (C. C. A. 8th); *Nashua & Lowell R. Corp.* v. *Boston & Lowell R. Corp.,* 61 Fed. 237, 240–241 (C. C. A. 1st); *Hoe* v. *Kahler,* 27 Fed. 145 (C. C., S. D. N. Y.); *Longsdorf,* Cyclopedia of Federal Procedure, Vol. 6, p. 211.

Not only is it clear that under comparable legislation an opinion may not be regarded as a decision or judgment for appellate purposes, but the decisions further establish that even a judgment itself does not attain an appealable status until it has been entered by the clerk in the records of the court. In the case of *In re Hurley Mercantile Co.,* 56 F. (2d) 1023, 1024–1025 (C. C. A. 5th), certiorari denied *sub nom. Atascosa County State Bank* v. *Coppard,* 286 U. S. 555, the court made a review of a number of the Federal statutes (including the Criminal Appeals Act) governing the time within which appeals must be taken. After alluding to the variation in the language of these statutes, the court said (p. 1025):

> We think Congress did not intend to establish a varying standard for beginning to count the time for appeal, but intended that the time should run only from the perfecting of the judgment or order as final by its filing with the clerk. Such was the ruling made touching appeals to the Supreme Court in *Seymour* v. *Freer,* 5 Wall. 822, 18 L. Ed. 564; *Rubber Co.* v. *Goodyear,* 6 Wall.

153, 18 L. Ed. 762; *Polleys* v. *Black River Co.*, 113 U. S. 81, 5 S. Ct. 369, 28 L. Ed. 938. In a statute relating to judgments reviewable in the Supreme Court, the term "rendered" was held to refer to such judgments as had attained appealable perfection. *Yznaga del Valle* v. *Harrison*, 93 U. S. 233, 23 L. Ed. 892. General Order in Bankruptcy XXXVI (11 USCA § 53) fixed the time for appeals in bankruptcy as "within thirty days after the judgment or decree," and this was said to mean thirty days after its entry. *Conboy* v. *First National Bank*, 203 U. S. 141, 27 S. Ct. 50, 51 L. Ed. 128. Statutes regulating appeals are remedial and should have a liberal construction in furtherance of the right of appeal. 2 R. C. L. "Appeal and Error," § 6. We hold this appeal taken within thirty days from the filing with the clerk of the judgment appealed from to be in time.

See also *Hughes*, Federal Practice, Vol. 8, pp. 448–449.

Not only is it apparent, therefore, that the Criminal Appeals Act may be brought in harmony with the other Federal legislation governing appeals only by giving such a construction to the words "decision or judgment" as will limit those words to a judgment which has been properly entered by the clerk, thereby excluding a mere opinion, but it may be pointed out that by Section 238 of the Judicial Code as amended by the Judiciary Act of February 13, 1925, Congress has

enumerated five classes of cases in which it permits a direct review by this Court of "an interlocutory or final *judgment* or decree" of a District Court (Italics ours). Among these classes of cases are cases covered by the Criminal Appeals Act (par. 2). This legislation would seem, therefore, to be an express recognition by Congress of its intention that appeals should be taken under the Criminal Appeals Act only from formal judgments.

We submit, therefore, that the Criminal Appeals Act should be construed as permitting a review by this Court only of a judgment of a District Court which has been duly and properly entered by the clerk of that court, and that, in consequence, the appeal in the present case, having been taken immediately after the entry of the order of April 14, 1936, sustaining the demurrer, was in time.

In the statement opposing jurisdiction (p. 2) reference is made to the fact that the Government's petition for appeal prayed for the allowance of an appeal from the judgment and order entered March 11, 1936 (R. 8). As heretofore stated, the opinion of the court was rendered on March 11, 1936, while its order sustaining the demurrer was not filed until April 14, 1936. It should be pointed out, however, that in its statement of jurisdiction, which was filed on the same day as its petition for appeal and which was presented to the District Court simultaneously therewith, pursuant to Rule 12 of this Court (R. 1, 8), the Government recited correctly (par. C, p. 3) that "The

judgment of the District Court sought to be reviewed was entered on April 14, 1936", and that the order of the District Court allowing the appeal expressly stated that it was based, not only on the petition for appeal, but also on the jurisdictional statement (R. 8–9). That order allowed an appeal, not from the opinion of the court, but from "the order and judgment of this court in sustaining the demurrer." The only order and judgment of the court sustaining the demurrer was that of April 14, 1936. As the Government's appeal papers were filed and presented to the District Judge after the entry of the order of April 14, 1936 (R. 1), and as it is perfectly obvious that the Government was seeking an appeal from that order and not from the opinion of March 11, 1936, we submit that the misdescription in the petition for appeal of the date of the order and judgment sustaining the demurrer was in the nature of a clerical error which may and should be disregarded. *Larkin Packing Co.* v. *Hinderliter Tool Co.*, 60 F. (2d) 491, 495 (C. C. A. 10th), and cases cited.

II

THE COURT BELOW ERRED IN CONSTRUING THE STANDARD CONTAINER ACT OF 1928 AS PERMITTING THE SALE OF TWO-QUART HAMPERS FOR FRUITS AND VEGETABLES

The indictment in this case charged the appellees with making certain sales of two-quart metal hampers for fruits and vegetables in violation of

the Standard Container Act of 1928 (Appendix A, *infra*, pp. 35–41), in that these hampers were not of any standard size authorized by the Act and did not come within any tolerance established by the Secretary of Agriculture pursuant to the Act for hampers so standardized (R. 1–3).

In sustaining the demurrer to the indictment, the opinion of the court below was based solely upon the ground that the Standard Container Act of 1928 did not apply to hampers for fruits and vegetables of a capacity of less than one-eighth of a bushel, or 4 quarts. The considerations which led the court to this conclusion were that Congress intended to fix the standards only for hampers ranging in size from one-eighth of a bushel as a minimum to two bushels as a maximum, and that it was unreasonable to suppose that Congress meant to forbid hampers of a smaller capacity than one-eighth of a bushel where such hampers contained the proper fractional part of the standard bushel as defined by the Act, as such a construction would result in an unnecessary interference with the business of those affected by the Act.[3] The practical effect of the court's decision

[3] The view of the court as to the supposed unreasonableness of the interpretation of the statute sought by the Government was apparently induced to some extent by its understanding that the Government was urging as a reason for the acceptance of its position the ground that the appellees' metal hampers "invaded a prior preempted or monopolized field occupied by the makers and users of wooden hampers" (R. 6). As the Act applies to all hampers, regardless of the

is, of course, to open the gates for the manufacture and sale of any size hamper which is below the minimum of one-eighth of a bushel or above the maximum of two bushels, provided only that it has a cubic capacity which does not deviate from a proper fractional part of the standard bushel prescribed by the Act. Such an interpretation of the statute is, we submit, unsound.

The clear language of Section 1 of the Act discloses that Congress established nine standard sizes for hampers[4] and round stave baskets for fruits and vegetables, and prescribed the cubic capacity of each of the standard sizes. The cubic capacity of each of the nine standard sizes was based on a cubic content of the standard bushel of 2,150.42 inches. Section 2 deals with splint baskets for fruits and vegetables in a similar manner. Section 3 directs the Secretary of Agriculture in his regulations under the Act to "prescribe such tol-

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material or substance of which they may be made, the materiality of any such contention is not readily apparent, and we, of course, do not advance any such argument here.

[4] A hamper is defined in the rules and regulations of the Secretary of Agriculture under the Standard Container Act of 1928 (Regulation 1, Sec. 2, Par. 5, effective June 1, 1933), as follows:

> HAMPERS.—A container, circular, elliptical, or polygonal at top and/or bottom, the top diameter of which is somewhat greater than the bottom and usually less than the depth, having slatted or solid sides ventilated or non-ventilated, and a fabricated or solid bottom which may be loose or fixed in place, or formed by a continuation of the sides.

erances as he may find necessary to allow in the *capacities* for hampers, round stave baskets, and splint baskets *set forth in sections 1 and 2 of this Act,* in order to provide for reasonable variations occurring in the course of manufacturing and handling." Section 4 provides specifically that no manufacturer shall manufacture hampers or the other containers referred to in the Act unless the dimension specifications shall have been submitted to and approved by the Secretary of Agriculture, who is directed to approve these specifications if he finds the hampers and other containers made in accordance therewith would not be deceptive in appearance and *"would comply with the provisions of sections 1 and 2 of this Act."* Section 5, the penalty section of the Act, provides that it shall be unlawful to manufacture for sale or shipment, to offer for sale, to sell, to offer for shipment, or to ship, hampers and round stave or splint baskets for fruits or vegetables, either filled or unfilled, *"that do not comply with this Act."* Section 5 contains the proviso, however, that the Standard Container Act of 1928 shall not apply to Climax baskets, berry boxes, and till baskets which comply with the provisions of the Standard Container Act of 1916 and the regulations thereunder. Section 6 provides for the condemnation, through appropriate libel proceedings in the United States District Courts, of hampers, round stave and splint baskets *"not complying with this Act."* Section 7 directs that the Act shall not "prevent the manufacture or

use of banana hampers of the shape and character now in commercial use as shipping containers for bananas." Section 9 directs the Secretary of Agriculture to prescribe such regulations as he may find necessary for carrying into effect the provisions of the Act and to make the necessary examinations and tests in order to determine whether the hampers and other containers covered by the Act meet its requirements. (Italics in paragraph ours.)

It is difficult to see how Congress could have used more specific language to indicate that it intended to permit the manufacture and sale only of the nine standard size hampers for fruits and vegetables which it prescribed and to prohibit all others. After setting up these nine standard sizes of hampers in Section 1 of the Act, Congress specifically directed that no manufacturer shall manufacture hampers unless the dimension specifications are submitted to the Secretary of Agriculture and it specifically forbade the Secretary from approving such specifications unless the hampers comply with the provisions of Section 1. In other words, the Secretary is prohibited from approving specifications for any hamper unless the hamper is of one of the standard sizes provided by Section 1 of the Act. These provisions are supplemented by the sections directing the prescribing of tolerances for the standard sizes of hampers only, penalizing the manufacture and sale of any hamper which does not comply with the Act, and authoriz-

ing the confiscation of hampers "not complying with the Act."

Moreover, it would seem significant that Congress found it necessary, in Section 7, to except from the purview of the statute the banana hamper, a container which is ordinarily ~~considerably~~ larger than the maximum two-bushel hamper permitted by the Act. If such a hamper would have been proscribed unless excepted, how can it be said that the statute permits a smaller hamper than the minimum one-eighth bushel or four quart hamper authorized by the statute.

We think it is therefore evident from the very face of the statute that it manifests a clear intent to permit the manufacture and sale, with the exception noted, only of the nine standard sizes of hampers which it prescribes, thereby eliminating two-quart hampers such as were sold by the appellees. Where a statute in its terms is so clear and free from doubt there is, as this Court has said, no room for construction. *United States* v. *Mo. Pac. R. Co.,* 278 U. S. 269.

While extrinsic aids to construction need not be resorted to in arriving at the proper interpretation of the Standard Container Act of 1928, we submit that such extrinsic aids if here utilized only serve to confirm that interpretation which we maintain is supported by the clear language of the Act. This Court has declared that, in case of ambiguity, it may turn for assistance to the legislative history of the statute (*Costanzo* v. *Tillinghast,* 287 U. S. 341, 345), may examine into the "history of

the times" and the conditions or evils which brought about the passage of the legislation [5] (*Atlantic Cleaners and Dyers* v. *United States,* 286 U. S. 427, 435; *Church of the Holy Trinity* v. *United States,* 143 U. S. 457, 465; *Daniels* v. *Tearney,* 102 U. S. 415, 419), and may consider also the contemporaneous construction of the statute by the administrative officials who are charged with enforcing it (*Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294).

While the particular provisions of the Standard Container Act of 1928 involved in the instant case are penal in character, this Court in *Donnelley* v. *United States,* 276 U. S. 505, 512, said that:

> The rule that penal statutes are to be strictly construed in favor of persons accused is not violated by allowing the language to have its full meaning where that construction is in harmony with the context and supports the policy and purposes of the enactment.

The Standard Container Act of 1928 is the fourth of a series of Acts passed since 1912 to

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[5] In informing itself of the conditions existing prior to the passage of the Standard Container Act of 1928, it is assumed that this Court may consider any relevant facts of which it may properly take notice. See *Muller* v. *Oregon,* 208 U. S. 412, 419; *New State Ice Company* v. *Liebmann,* 285 U. S. 262, 286–287 (dissent); *Bandini Co.* v. *Superior Court,* 284 U. S. 16; *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 422, 444; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 10–15; *Nebbia* v. *New York,* 291 U. S. 502; *Burns Baking Co.* v. *Bryan,* 264 U. S. 504, 514, 519; *Schollenberger* v. *Pennsylvania,* 171 U. S. 1, 10; *United States* v. *Butler,* 297 U. S. 1, 71.

secure the standardization of certain kinds of containers for fruits and vegetables. The first Act, approved August 3, 1912 (c. 273, 37 Stat. 250; U. S. C., Title 15, Secs. 231–233), established the standard barrel for apples. This was followed by the Act of March 4, 1915 (c. 158, 38 Stat. 1186, U. S. C., Title 15, Secs. 234–236), establishing standard barrels for fruits and vegetables, cranberries, and other dry commodities. The next in order was the Standard Container Act of 1916, c. 426, 39 Stat. 673 (U. S. C., Title 15, Sec. 251 *et seq.*). This Act, in Section 1, established three standard sizes for Climax baskets for grapes and other fruits and vegetables and prescribed the dimensions for each size. In Section 2 it provided that the "standard basket or other container for small fruits, berries, and vegetables" shall be the dry ½ pint, the dry pint, the dry quart, or a multiple of the dry quart. It made no reference to the form of the containers, nor did it prescribe the dimensions therefor. *Pacific States Co.* v. *White*, 296 U. S. 176, 183. Taken as a whole, it is evident, from a standardization standpoint, that the Act was clearly adequate as to Climax baskets, and the same was undoubtedly true as to the containers for small fruits and berries such as till baskets and berry boxes, which, because of the nature of the products, are ordinarily packed in small containers. This was recognized, it would seem, by the proviso to Section 5 of the 1928 Act excepting "Climax baskets, berry boxes, and till baskets" from any

possible reach of the statute. It is obvious, however, that as to the containers for large fruits, Section 2 of the 1916 Act made no provision, and that so far as the larger containers for vegetables were concerned the only limitation upon size was that these containers must be in multiples of the dry quart. This obviously permitted a wide variety of sizes. Although only a partial standardization of containers was possible through the Standard Barrel Act of 1915 and the Standard Container Act of 1916, there resulted the elimination of a large number of unnecessary sizes of barrels, Climax baskets, berry boxes, and till baskets. As was pointed out in Farmers Bulletin No. 1434, issued by the Department of Agriculture in September 1924, pp. 4–6:

> The two acts have done away with a large number of unnecessary sizes of barrels, Climax baskets, till baskets, and berry boxes, and have awakened a widespread demand for the application of the same principle to other containers (figs. 4 and 5). In baskets and berry boxes the reductions represent the elimination of 93, 84, and 82 per cent, respectively, of the sizes formerly used. This reduction has improved marketing conditions in the produce shipped in these containers because there is now no question as to the size of the container, and it works to the benefit of growers, shippers, and consumers. To the manufacturer it has meant a reduction in the number of forms necessary to supply his customers; he can now

make up stock ahead of orders; and it has extended his market, because the containers which he makes are now standard and in use the country over. Similar results can be accomplished by standardization of other containers.

The beneficent effect of this legislation resulted in agitation for a definite standardization of other types of containers, and efforts were made at every session of Congress from 1920 to 1928 to supplement the 1916 Act by an Act standardizing the sizes of hampers, round stave baskets, and splint baskets. See Report of the Senate Committee on Agriculture and Forestry (S. Rep. 303, 70th Cong., 1st Sess.).

Hearings were held by the Committee on Coinage, Weights, and Measures of the House of Representatives at which were present representatives of container manufacturers and fruit and vegetable growers, as well as officials of the Department of Agriculture and state officials concerned with the enforcement of weights and measures. These hearings disclosed, the Committee said in its report (H. Rep. 1129, 70th Cong., 1st Sess.), that there were then "at least 50 to 75 different weights of hampers being used, and about 40 different sizes ranging from 1 quart to 50 quarts", and that "The same condition exists with reference to round stave baskets and splint baskets, which are commonly known as the market basket." The evils which resulted from this situation and the objects and purposes

which Congress sought to accomplish by the legislation which became the Standard Container Act of 1928 are then clearly explained by the Committee in its report as follows:

> The object and purpose of this legislation is to standardize certain sizes of hampers and baskets used in the marketing of fruits and vegetables, and *to make it unlawful to either manufacture, sell, or offer for sale containers not corresponding in size with those herein mentioned.*
>
> * * * * *
>
> The main reasons and purposes for the enactment of this measure may be more fully set forth as follows:
>
> *Purposes.*—1. To improve marketing conditions by—
>
> (a) Providing a more accurate and definite basis for market quotations.
>
> (b) Eliminating the unfair competition which the grower who uses full capacity containers must meet from the user of short containers.
>
> (c) Protecting the consumer against deception.
>
> (d) *Simplifying manufacturing processes by eliminating unnecessary sizes.*
>
> *What it does.*—1. Establishes standard capacities for hampers, round stave baskets, and splint baskets.
>
> 2. Requires manufacturers to submit statement of dimension specifications to Secretary of Agriculture for approval.

3. Requires Secretary of Agriculture to approve of such specifications if a basket made according to them will *conform to one of the standard capacities set up in the bill* and is not deceptive in appearance.

4. *Forbids manufacturer, sale, or shipment of nonstandard containers.*

* * * * *

The committee believes that it is manifestly unfair to the producers, the jobbers, or retailers, as well as to the consumers, to permit the continuance of this confusion in handling food products, and it is unfair to the honest dealers to be required to compete with the unscrupulous dealers using containers having the same apparent sizes, but really containing a lesser amount than the purchaser believes that he is obtaining.

In view of the urgent request made for the passage of this measure by all of the organizations interested in the production and consumption of the commodities to be sold in the containers mentioned, the committee unanimously recommends the passage of this bill. (Italics ours.)

And in Senate Report No. 303, 70th Cong., 1st Sess., there is contained a letter from the Acting Secretary of Agriculture, under date of January 27, 1928, in which he specifically states that "the object of the bill is to eliminate unnecessary sizes of hampers, round stave baskets, and splint baskets", and that the result of the bill would be to improve marketing conditions by, among other

things, "(d) simplifying manufacturing processes by eliminating unnecessary sizes." See also House Report No. 370, 68th Cong., 1st Sess.; House Report No. 852, 66th Cong., 2d Sess.

From these reports it cannot be doubted that it was the avowed purpose of Congress in enacting the Standard Container Act of 1928 to eliminate all sizes of hampers, round stave baskets, and splint baskets other than those specified in the statute.

In *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315, *supra,* this Court said that: "The [administrative] practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. *Fawcus Machine Co.* v. *United States, supra.*" That it was the understanding of the Department of Agriculture, the Department charged with the administration of the Act of 1928, that this legislation forbade the manufacture and sale of hampers which were not of the standard sizes prescribed is evident from the regulations issued by the Secretary of Agriculture establishing tolerances and providing for the approval of dimension specifications only for the sizes of containers made standard by the Act (*infra,* p. 64 *et seq.*). This administrative construction of the Act is also supported by various statements by officials of the Bureau of Agricultural Economics, the Bureau to whom the

enforcement of the Act was assigned by the Secretary in his regulations, in addresses made at various national conferences on weights and measures held at the Bureau of Standards and attended by weights and measures officials of the different States (*infra,* p. 41 *et seq.*). For example, at the Twenty-Second National Conference on Weights and Measures held in 1929, the Senior Marketing Specialist of the Bureau of Agricultural Economics, in addressing the conference on "The Federal Standard Container Act of 1928", said:

> As finally passed, Section 1 provided as standards for hampers and round stave baskets the ⅛, ¼, ½, ⅝, ¾, 1, 1¼, 1½, and 2 bushel sizes. Section 2 sets up for splint baskets 4, 8, 12, 16, 24, and 32 quarts as the standard sizes. This is a reduction of 67 per cent in the number of sizes of hampers and of at least 50 per cent in the number of sizes of splint baskets.

The regulations of the Secretary of Agriculture, as well as the statements of the various officials of the Department of Agriculture as to the purpose and effect of the legislation, are printed in Appendix B, *infra,* p. 41 *et seq.*[7]

[7] Contained in the Appendix, p. 51, is a photograph reproduced from the December 15, 1922, issue of the Barrel and Box, a publication devoted to the box, pail, stave, heading, and hoop interests (Volume XXVII, No. 10, p. 33). This photograph appeared in connection with an article entitled "Standardization of Wooden Shipping Containers", and illustrates very strikingly the variety in style and size of hampers which were in use prior to the enactment of the Standard Container Act of 1928. Another photograph ap-

In a motion to affirm contained in their statement opposing jurisdiction, the appellees rely upon a sentence in the opinion of this Court in *Pacific States Co.* v. *White,* 296 U. S. 176, *supra,* as supporting their construction that the Standard Container Act of 1928 is inapplicable to the manufacture and sale of two-quart hampers for fruits and vegetables. In that case this Court said (pp. 182–183):

> The standard prescribed by the order does not conflict with any established by Congress. The Standard Baskets and Containers Act of May 21, 1928, c. 664, 45 Stat. 685, has no relation to the matter here under consideration. That statute deals solely with hampers, round stave, and splint baskets of capacity not less than one-eighth bushel.

While the last sentence of this quotation, taken literally, seems to support the contention of the appellees, we do not think it can fairly be said, when this case is analyzed, that this Court had in mind the question which is here presented.

The question involved in the *Pacific States Co.* case was the validity of an order of a State Department of Agriculture fixing as the standard containers for raspberries and strawberries pint hallocks of certain dimensions. The plaintiff who assailed the order was a manufacturer of a form of

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pearing in the Appendix, p. 52, shows the standard sizes of hampers permitted by the Standard Container Act of 1928, the two-bushel size, however, being omitted.

container which was known as a tin top or metal rim container. It was concededly not a hallock, and there is nothing in the opinion from which the conclusion can be drawn that this Court considered it to be a hamper. The plaintiff contended, among other things, that the standard container prescribed by the State order was in conflict with those established by the Standard Container Act of 1928 and the Standard Container Act of 1916. As the Standard Container Act of 1928 deals only with hampers, round stave and splint baskets for fruits and vegetables, and specifically excepts from its operation "berry boxes" which comply with the Standard Container Act of 1916, it is evident that the Act of 1928 had no application to containers either of the type manufactured and sold by the plaintiff or the type referred to in the order of the State Department of Agriculture. This Court itself in the sentence upon which the appellees rely pointed out this distinction when it said that the Standard Container Act of 1928 "deals solely with hampers, round stave, and splint baskets", and, consequently, had no relation to the matter before it. In going further and stating that the statute dealt solely with hampers, round stave, and splint baskets "of capacity not less than one-eighth bushel", the Court was obviously not required, in view of the contention before it or the types of containers involved, to give consideration to the question here presented as to whether the Standard Container Act of 1928 prohibits the manufacture

and sale of *hampers* of a capacity less than one-eighth of a bushel.

Very little discussion was directed in the opinion to the Standard Container Act of 1928, as the opinion discloses (p. 183) that the controversy with reference to the alleged conflict between the State order and the legislation of Congress hinged principally upon the applicability of Section 2 of the earlier Container Act of 1916 (U. S. C., Title 15, Sec. 252 *et seq.*), which dealt with the cubic capacity of *any type* of container for small fruits, berries, and vegetables *regardless of form* or dimensions. It was because of the fact that this section prescribed neither the form nor the dimensions of the containers to which it related that this Court held that the Standard Container Act of 1916 left to the individual States the adoption of the standards in these respects if deemed necessary, and, consequently, was not in conflict with the State order.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below sustaining the demurrer to the indictment should be reversed.

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OCTOBER 1936.

APPENDIX A

STATUTES INVOLVED

The Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), insofar as pertinent, provides:

> That a writ of error (now appeal) may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.
>
> * * * * *
>
> The writ of error (now appeal) in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.
>
> * * * * *

The Standard Container Act of May 21, 1928, c. 664, 45 Stat. 685 (U. S. C., Title 15, Secs. 257–257i), provides:

> SEC. 1. That the standard hampers and round stave baskets for fruits and vegetables shall be of the following capacities: One-eighth bushel, one-fourth bushel, one-half bushel, five-eighths bushel, three-fourths bushel, one bushel, one-and-one-fourth bushels, one-and-one-half bushels, and two

bushels, which, respectively, shall be of the cubic content set forth in this section. For the purposes of this Act a bushel, standard dry measure, has a capacity of two thousand one hundred and fifty and forty-two one-hundredths cubic inches.

(a) The standard one-eighth bushel hamper or round stave basket shall contain two hundred and sixty-eight and eight-tenths cubic inches.

(b) The standard one-fourth bushel hamper or round stave basket shall contain five hundred and thirty-seven and six-tenths cubic inches.

(c) The standard one-half bushel hamper or round stave basket shall contain one thousand and seventy-five and twenty-one one-hundredths cubic inches.

(cc) The standard five-eighths-bushel hamper or round stave basket shall contain one thousand three hundred and forty-four cubic inches.

(d) The standard three-fourths-bushel hamper or round stave basket shall contain one thousand six hundred and twelve and eight-tenths cubic inches.

(e) The standard one-bushel hamper or round stave basket shall contain two thousand one hundred and fifty and forty-two one-hundredths cubic inches.

(f) The standard one-and-one-fourth-bushel hamper or round stave basket shall contain two thousand six hundred and eighty-eight cubic inches.

(g) The standard one-and-one-half-bushel hamper or round stave basket shall contain three thousand two hundred and twenty-five and sixty-three one-hundredths cubic inches.

(h) The standard two bushel hamper or round stave basket shall contain four thou-

sand three hundred and eighty-four one-hundredths cubic inches.

SEC. 2. That the standard splint baskets for fruits and vegetables shall be the four-quart basket, eight-quart basket, twelve-quart basket, sixteen-quart basket, twenty-four-quart basket, and thirty-two-quart basket, standard dry measure. For the purposes of this Act a quart standard dry measure has a capacity of sixty-seven and two-tenths cubic inches.

(a) The four-quart splint basket shall contain two hundred and sixty-eight and eight-tenths cubic inches.

(b) The eight-quart splint basket shall contain five hundred and thirty-seven and six-tenths cubic inches.

(c) The twelve-quart splint basket shall contain eight hundred and six and four-tenths cubic inches.

(d) The sixteen-quart splint basket shall contain one thousand and seventy-five and twenty-one one-hundredths cubic inches.

(e) The twenty-four quart splint basket shall contain one thousand six hundred and twelve and eight-tenths cubic inches.

(f) The thirty-two quart splint basket shall contain two thousand one hundred and fifty and forty-two one-hundredths cubic inches.

SEC. 3. That the Secretary of Agriculture shall in his regulations under this Act prescribe such tolerances as he may find necessary to allow in the capacities for hampers, round stave baskets, and splint baskets set forth in sections 1 and 2 of this Act in order to provide for reasonable variations occurring in the course of manufacturing and handling. If a cover be used upon any hamper or basket mentioned in this Act, it shall be securely fastened or attached in such a

manner, subject to the regulations of the Secretary of Agriculture, as not to reduce the capacity of such hamper or basket below that prescribed therefor.

SEC. 4. That no manufacturer shall manufacture hampers, round stave baskets, or splint baskets for fruits and vegetables unless the dimension specifications for such hampers, round stave baskets, or splint baskets shall have been submitted to and approved by the Secretary of Agriculture, who is hereby directed to approve such specifications if he finds that hampers, round stave baskets, or splint baskets for fruits and vegetables made in accordance therewith would not be deceptive in appearance and would comply with the provisions of sections 1 and 2 of this Act.

SEC. 5. That it shall be unlawful to manufacture for sale or shipment, to offer for sale, to sell, to offer for shipment, or to ship, hampers, round stave baskets, or splint baskets for fruits or vegetables, either filled or unfilled, or parts of such hampers, round stave baskets, or splint baskets that do not comply with this Act: *Provided,* That this Act shall not apply to Climax baskets, berry boxes, and till baskets which comply with the provisions of the Act approved August 31, 1916, entitled "An Act to fix standards for Climax baskets for grapes and other fruits and vegetables, and to fix standards for baskets and other containers for small fruits, berries, and vegetables, and for other purposes" (Thirty-ninth United States Statutes at Large, page 673), and the regulations thereunder. Any individual, partnership, association, or corporation that violates this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding

$500: *Provided further,* That no person shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the manufacturer, wholesaler, shipper, or other party residing within the United States from whom the hampers, round stave baskets, or splint baskets, as defined in this Act, were purchased, to the effect that said hampers, round stave baskets, or splint baskets are correct, within the meaning of this Act. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of the hampers, round stave baskets, or splint baskets to such person, and in such case such party or parties making such sale shall be amenable to the prosecution, fines, and other penalties which would attach in due course under the provisions of this Act to the person who made the purchase.

SEC. 6. That any hamper, round stave basket, or splint basket for fruits or vegetables, whether filled or unfilled, or parts of such hampers, round stave baskets, or splint baskets not complying with this Act, which shall be manufactured for sale or shipment, offered for sale, sold, or shipped, may be proceeded against in any district court of the United States within the district where the same shall be found and may be seized for confiscation by a process of libel for condemnation. Upon request the person entitled shall be permitted to retain or take possession of the contents of such hampers or baskets, but in the absence of such request, or when the perishable nature of such contents makes such action immediately necessary, the same shall be disposed of by destruction or sale, as the court or a judge thereof may direct. If such hampers, round stave baskets, splint baskets, or

parts thereof be found in such proceeding to be contrary to this Act, the same shall be disposed of by destruction, except that the court may by order direct that such hampers, baskets, or parts thereof be returned to the owner thereof or sold upon the payment of the costs of such proceedings and the execution and delivery of a good and sufficient bond to the effect that such hampers, baskets, or parts thereof shall not be sold or used contrary to law. The proceeds of any sale under this section, less legal costs and charges, shall be paid over to the person entitled thereto. The proceedings in such seizure cases shall conform as near as may be to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in such case, and all such proceedings shall be at the suit and in the name of the United States.

SEC. 7. That this Act shall not prohibit the manufacture for sale or shipment, offer for sale, sale, or shipment of hampers, round stave baskets, splint baskets, or parts thereof, to any foreign country in accordance with the specifications of a foreign consignee or customer not contrary to the law of such foreign country; nor shall this Act prevent the manufacture or use of banana hampers of the shape and character now in commercial use as shipping containers for bananas.

SEC. 8. That it shall be the duty of each United States district attorney to whom satisfactory evidence of any violation of this Act is presented to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States in his district for the enforcement of the provisions of this Act.

SEC. 9. That the Secretary of Agriculture shall prescribe such regulations as he may find necessary for carrying into effect the provisions of this Act, and shall cause such examinations and tests to be made as may be necessary in order to determine whether hampers, round stave baskets, and splint baskets, or parts thereof, subject to this Act, meet its requirements, and may take samples of such hampers, baskets, or parts thereof, the cost of which samples, upon request, shall be paid to the person entitled.

SEC. 10. That for carrying out the purposes of this Act the Secretary of Agriculture is authorized to cooperate with State, county, and municipal authorities, manufacturers, dealers, and shippers, to employ such persons and means, and to pay such expenses, including rent, printing publications, and the purchase of supplies and equipment in the District of Columbia and elsewhere, as he shall find to be necessary, and there are hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary for such purposes.

SEC. 11. That sections 5 and 6 of this Act shall become effective at but not before the expiration of one year following the 1st day of November, next, succeeding the passage of this Act.

APPENDIX B

[Extracts from various documents showing conditions which called for standardization of sizes of hampers, together with views of those charged with the enforcement of the Standard Container Act of 1928 as to its purposes and effect]

In Farmers' Bulletin No. 1434, entitled "Standard Baskets for Fruits and Vegetables", issued by

the Department of Agriculture in September 1924 the following foreword appears on the inside front cover.

> Standardization of containers for marketing fruits and vegetables is an important problem that demands the attention of the general public. It is vitally necessary in the interest of a square deal that the exact content of these packages be generally known and that the different sizes be readily distinguishable from each other.
>
> Federal standards are now in force regarding the sizes of barrels used for fruits and vegetables and for cranberries, and Federal standards are fixed for grape baskets, berry boxes, and small till baskets.
>
> A serious lack of uniformity is still to be corrected in the sizes of such packages as hampers, round stave baskets, splint or market baskets, and of many boxes and crates used in the marketing of perishables.

On page 3 of this bulletin are two photographs illustrating very vividly the difference in quantity held by several hampers which appear to be identical in size but which are not actually of the same size.

On page 4 of this pamphlet it was said with respect to the importance of standardizing containers:

> Standard containers for marketing fruits and vegetables are of more interest to the average citizen than he generally realizes. He is at all times a consumer of some commodity and may be a grower or shipper of other commodities, a manufacturer of containers, or an official of a railroad, steamship line, or other carrier. As a consumer he is frequently defrauded by the substitution of short-measure packages at the full-

measure price. Also the cost of marketing is increased by the greater expense of manufacturing a large number of styles and sizes and by breakage in transit, which may be due to weak packages, to improper stowage, or to the difficulty of loading odd-sized containers.

Standardization means to the manufacturer that production is simplified and that he can concentrate on a few sizes, with consequent lowering of costs. To the carrier it means the elimination of many sizes which now help to complicate the problem of damage in transit, and narrows the container problem to a few sizes for which standard strength specifications can be worked out and approved methods of stowing and bracing devised. The grower or shipper benefits by any action that lowers the cost of manufacture and tends to reduce breakage in transit. In addition standard containers provide him with a definite basis of sale so far as the size of his package is concerned. He is thus relieved of unfair competition through use by his competitor of a "short" package.

On pages 4 to 6 it was said with reference to the Standard Barrel Act of 1915 and the Standard Container Act of 1916:

The United States standard barrel act, passed in 1915, is enforced by the Bureau of Standards, United States Department of Commerce, and in those States which have legally adopted the Federal standard by the local sealers of weights and measures. The United States standard container Act of 1916, fixing standards for Climax baskets and for berry boxes and small till baskets, is enforced by the Bureau of Agricultural

Economics of the United States Department of Agriculture.

The two acts have done away with a large number of unnecessary sizes of barrels, Climax baskets, till baskets, and berry boxes and have awakened a widespread demand for the application of the same principle to other containers (figs. 4 and 5). In baskets and berry boxes the reductions represent the elimination of 93, 84, and 82 per cent, respectively, of the sizes formerly used. This reduction has improved marketing conditions in the produce shipped in these containers because there is now no question as to the size of the container, and it works to the benefit of growers, shippers, and consumers. To the manufacturer it has meant a reduction in the number of forms necessary to supply his customers; he can now make up stock ahead of orders; and it has extended his market, because the containers which he makes are now standard and in use the country over. Similar results can be accomplished by standardization of other containers.

On pages 11 and 12 it was said with reference to hampers:

The hamper is one of the most widely used shipping containers, and is especially popular in the Eastern and Southern States. Almost 30,000,000 of these baskets are used annually. When made of light materials the hamper is well adapted for marketing light produce, such as lettuce and kale; and when of heavier construction, it can be used in shipping such products as sweet potatoes and apples.

A glance at Figure 8 shows a large number of styles and sizes of hampers in use at present. [The photograph referred to is

reproduced on page 51 of this Appendix.] On account of the different shapes and sizes it is practically impossible for a purchaser to know just how much he is getting, when he buys a hamper of produce.

The need for standard dimensions is not generally recognized. On first consideration it would seem that if all standard bushel hampers contained the same cubic content there would be no chance for deception. This is not altogether true, as will be seen by referring to Figure 10. The baskets shown in this group are all standard bushels, but one would never know it by looking at them. Another important reason for fixing standard dimensions is to facilitate the development of standard rules for loading these containers in cars.

It is estimated that one-third of the so-called half-bushel hampers which are manufactured to-day are short measure. In fact, the use of the 14-quart basket has become universal in certain districts, entirely supplanting the 16-quart or half-bushel basket.

The seven-eighth or 28-quart hamper, which is frequently so made as to hold as little as 27 quarts, is another size which should be eliminated. (See fig. 2.) It is used largely for shipping southern produce and masquerades as a full bushel in the markets. This basket has already been declared illegal in Texas, New Jersey, Indiana, Ohio, and the District of Columbia. About 25 per cent of what are commonly supposed to be bushel baskets are short measure.

Still another size in common use which should be eliminated is the 5-peck hamper. This size does not meet any need which is not filled by the 1 bushel and 1½ bushel sizes.

The 20-quart or five-eighths bushel brace basket is used chiefly in the territory tributary to Philadelphia, where it is employed extensively in hauling tomatoes to the canneries. This size is not to be regarded as a short container, because it is more likely to be confused with the 16-quart or half-bushel basket than with a larger size; but it does not appear in the list of proposed standards recommended by the Bureau of Agricultural Economics. However, it should be noted that there is used to some extent in Philadelphia a 16-quart brace basket, which so closely resembles the 20-quart hamper in construction and size as to be readily mistaken for it.

The ordinary hamper is circular in form, but an oval shape (fig. 11) has been put on the market recently by one manufacturer. Instead of a number of staves of equal size, this type has a wide panel on each side with three smaller staves at each end. The wide panels permit the placing of a label on the package. This hamper has been used for shipping apples, cucumbers, and sweet potatoes.

In some eastern sections a bushel hamper with a loose bottom is used for apples. The cover is placed in position, the hamper turned bottom up, and the fruit ring-packed through the bottom end. The bottom is then forced into place and nailed in.

The sizes of hampers recommended by the Bureau of Agricultural Economics as being sufficient in number to satisfy all legitimate requirements of the trade are as follows: Eight-quart, or one-quarter bushel; 16-quart, or one-half bushel; 24-quart, or three-quarter bushel; 32-quart, or one

bushel; 48-quart, or one and one-half bushel (fig. 8). All of these sizes are necessary.

The 24-quart size is recommended, because there is a demand for a container between the half-bushel and bushel sizes. This demand is now met in one section of the country by the 20-quart size and in other sections by the 28-quart size. Neither of these sizes has any place in a logical system of standard containers, whereas the use of the 24-quart size gives a series of standards of 1, 2, 3, 4, and 6 peck capacity. (Italics ours.)

On page 15 it was said:

> The carriers of the United States say that in the handling of perishables the losses in one year amounted to $10,000,000. Among the many causes of these losses are rough handling, failure to stow shipments properly in cars, delay in transit, lack of proper refrigeration, and frail containers. Such a tax on the fruit and vegetable business of the country calls for cooperation on the part of growers, shippers, container manufacturers, and carriers in an effort to reduce the damage to the lowest possible point.

In an address by F. P. Downing, of the Bureau of Markets of the Department of Agriculture, on "The Present Movement Toward Obtaining Standard Shipping Containers for Marketing Fresh Fruits and Vegetables", delivered at the Twelfth Annual Conference on Weights and Measures held at the Bureau of Standards May 21–24, 1919 (Miscellaneous Publications, Department of Commerce, No. 41, p. 89 *et seq.*), it was said (p. 92):

> I believe it is best to take this thing up from the standpoint of individual con-

tainers. We have already standardized the grape basket; we have already standardized the berry basket and the till basket; and now, gradually, we can standardize the other baskets. We have worked out with our legal advisers a bill standardizing the round-stave basket and the hamper. There are more than 30 sizes of these baskets, almost as many baskets as there are quarts in a bushel. Now, we can get away from that by selecting only those sizes that are necessary for carrying out legitimate trade. *We believe, from a thorough study of this question, that five sizes are a sufficient number, the 8, 16, and 20 quart, the bushel, and the bushel and a half.* (Italics ours.)

On pages 92–93 it was said:

I do not know whether you gentlemen realize how important this is, but the railroads report that their claims for loss and damage in transit in the last year amounted to something like $100,000,000 on all commodities shipped; that first in point of loss in transit was grain, and a close second to grain was perishables. The latter loss was largely from breakage due to failure to load packages in the cars solidly, on account of the many different dimensions; and due also to lack of strength. All the grower seemed to be interested in was something to put on the platform. Later on he held the railroad responsible by putting in a claim for damage. As a result the United States Railroad Administration to-day has appointed a committee, known as the "Blood committee," for the standardization of packages. The railroads are very much interested in this movement toward standard packages and

have subcommittees all over this country. Their idea is to put these standard specifications into the railroad tariffs and to put a higher tariff on nonstandard packages; or to refuse to allow claims on such packages. Now, there may be some question as to whether it is advisable for the railroads to do this. Some of our shippers are saying that in doing so they are trying to exercise a function of Congress; that they are trying to establish standards. But whether it is constitutional or not, the railroads have already begun to get results. Only a few weeks ago I saw the first standard bushel hamper of cucumbers come from the State of Florida; the railroads are going to refuse to carry cucumbers in anything but that standard package.

In this proposed bill, in addition to the standards of the hamper, we are also proposing standards for the round-stave basket. Here, again, we have a similar condition. The hamper is used very largely in the South and East. The round-stave basket is more distinctly a package of the Northwest and Central States, even out as far as Texas.

* * *

In the December 1922 issue of The Barrel and Box, a publication devoted to the box, cooperage, pail, stave, heading, and hoop interests (Vol. XXVII, No. 10, p. 33), there appears in connection with an article entitled "Standardization of Wooden Shipping Containers" a photograph which is reproduced on page 51, with the legend given below the same.

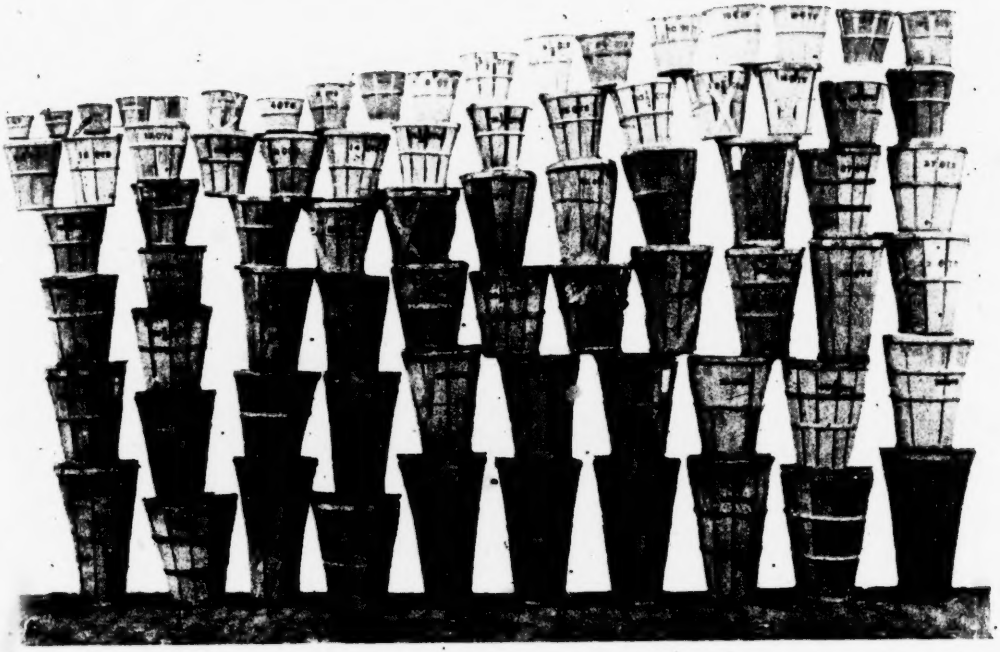
At the Nineteenth National Conference on Weights and Measures held at the Bureau of Standards May 25–28, 1926, the following resolution was adopted by the Conference (p. 168):

RESOLUTION ON STANDARD HAMPERS AND BASKETS

> Whereas Congress has before it certain bills to standardize hampers, round-stave baskets, and splint baskets for interstate shipment of vegetables and fruit: Therefore be it
>
> *Resolved,* That we, the delegates of the Nineteenth National Conference on Weights and Measures, meeting at Washington, D. C., May 25 to 28, 1926, do hereby indorse the principle of such legislation as one making for economy, standardization, and the prevention of fraud in the sale of commodities so handled.

In a report of the Chief of the Bureau of Agricultural Economics to the Secretary of Agriculture under date of September 11, 1929, it was said (p. 23):

> The passage of the standard hamper and basket act of 1928 greatly increased the standard-container work. In addition to the grape baskets and berry boxes which were included under the act of 1916, hampers, round-stave baskets, and splint baskets are now under the jurisdiction of the department.
>
> These acts are administered as a service project; only one prosecution has ever been found to be necessary. A large volume of work is necessary in making tests and meas-



GROUP OF HAMPERS SHOWING SIZES AND STYLES IN USE. A STRIKING ILLUSTRATION OF NEED OF STANDARDIZATION.

U. S. DEPARTMENT OF AGRICULTURE

BUREAU OF AGRICULTURAL ECONOMICS

SIZES OF HAMPERS PERMITTED BY THE STANDARD CONTAINER ACT OF 1928, THE TWO BUSHEL SIZE, HOWEVER, BEING OMITTED.

> urements of the samples of containers submitted in order to pass upon their legality. A much larger percentage of the samples of the large containers covered by the act of 1928 have been found to be nonstandard than has been the case with the smaller containers covered by the act of 1916. More conferences with manufacturers have been necessary, and more educational work has been done. Very satisfactory progress has been made, however, and excellent cooperation has been given the bureau.

In an address by H. A. Spilman, Senior Marketing Specialist, Bureau of Agricultural Economics, Department of Agriculture, on "The Federal Standard Container Act of 1928", delivered at the Twenty-Second National Conference on Weights and Measures held at the Bureau of Standards June 4–7, 1929 (Miscellaneous Publications, Bureau of Standards, No. 101, p. 13, *et seq.*), the paper being read by L. C. Carey, Marketing Specialist, Department of Agriculture, it was said (pp. 13–15):

> We have two Federal laws affecting the baskets used for fruits and vegetables. These are commonly known as the United States standard container act and the United States standard container act of 1928. The one known as the United States standard container act has been on the statute books since 1916 and became effective November 1, 1917. The name by which that act has been known is somewhat of a misnomer, since it is by no means as general in its scope as the name would signify. The main purpose of that law was to standard-

ize the Climax baskets used for grapes and the small baskets or boxes used for berries. In fact, the law as passed was a combination of a bill for standardization of Climax baskets and one for the standardization of berry boxes. As put together, its wording was such as to standardize also what we call till baskets and to indirectly affect larger containers, such as hampers, round stave baskets, and splint baskets. This effect was secured by reason of the law's requirement that containers of fruits and vegetables be made in multiples of the dry quart.

* * * * *

This original standard container act reduced the number of Climax baskets from 31 to 3, the number of till baskets from 30 to 5, and the number of sizes of berry boxes from 17 to 3. These reductions represent the elimination of 93, 84, and 82 per cent, respectively, of the sizes formerly used.

* * * * *

The results of this original standard container act proved so satisfactory to manufacturers that they requested the Department of Agriculture to undertake investigations looking toward the standardization of hampers, round stave baskets, and splint baskets.

These investigations demonstrated that there was as much need of standardization of these three types as there ever had been of the three types already standardized. Hampers were found to be made in the following sizes: 2, 4, 6, 8, 10, 12, 13, 13½, 14, 15, 16, 18, 20, 24, 27, 28, 30, 32, 40, 44, and 48 quart. Added to this great number of sizes was a great variation in dimensions, so

that there were something like 75 capacities and dimensions for hampers. In the case of round stave baskets the condition was not so bad, as 25 or 30 would cover the number of different sizes made. So far as splint baskets are concerned, nobody has ever attempted to estimate the number of sizes and differences in dimensions which have existed during the past years.

As a result of the investigations made by the Department of Agriculture there was drawn up in the fall of 1919 a tentative form of the bill for the standardization of hampers, round stave baskets, and splint baskets. *This was done for the purpose of discussion with manufacturers, and it was found that they wished rather rigid and definite restrictions set up. They wished the number of sizes cut down to a very small number; they wanted dimension specifications for each size and type made a matter of law; and also wished the law to define certain elements affecting the strength of containers, such as the number and thickness of staves and thickness of hoops.* This bill was probably rewritten a good many times before it met the approval not only of the manufacturers of baskets but of large organizations such as the American Farm Bureau Federation, the National League of Commission Merchants, the International Apple Shippers' Association, and the Western Fruit Jobbers Association. In the end a bill along the lines indicated above was introduced in the House of Representatives in the early part of 1920 by Representative Vestal, of Indiana, at the request of the National League of Commission Merchants.

This original bill prescribed as sizes for hampers the ¼, ½, 1, and 1½ bushel. The sizes were the same for the round stave baskets except that the 2-bushel size was added to take care of certain farm baskets. For splint baskets the sizes specified were the 4, 8, 12, 16, and 24 quart.

At hearings which were held on the bill considerable sentiment developed from New Jersey, Delaware, and Maryland in favor of the retention of the 20-quart size of hamper. As a result of the representations made with some force before the committee this size was inserted as one of the standards both for the hamper and the round stave basket. In this shape the bill went before the House and was discussed in Committee of the Whole on two different days. One of the first things which the House did was to knock out all of the specifications affecting the strength of baskets. With the amendments made, the bill passed the House in Committee of the Whole, but was never reported into the House itself. This was the first skirmish on a piece of legislation which remained before Congress for eight years before finally achieving passage. During the eight years its form was modified to a considerable extent. Dimension specifications were dropped as well as strength specifications, and additions were made to the number of standards. *As finally passed, section 1 provides as standards for hampers and round stave baskets the ⅛, ¼, ½, ⅝, ¾, 1, 1¼, 1½, and 2 bushel sizes. Section 2 sets up for splint baskets 4, 8, 12, 16, 24, and 32 quarts as the standard sizes. This is a reduction of 67 per cent in the number of*

sizes of hampers and of at least 50 per cent in the number of sizes of splint baskets. During the years the law was under discussion the makers of round stave baskets voluntarily cleaned house and its final passage makes but little difference to them. (Italics ours.)

In a discussion of this paper the following appears (pp. 18–19):

> Mr. ROGERS. We would like to know whether or not the manufacturers can manufacture containers of other sizes for use in the State of New Jersey?
>
> Mr. CAREY. If the container is a hamper, a round stave basket, or a splint basket, it would be illegal to do so.
>
> * * * * *
>
> Mr. CAREY. * * * The standard container act of 1928 fixes the sizes of hampers, round stave baskets, and splint baskets. Sizes other than those standards are illegal and can not be made, sold, or shipped, or offered for sale or shipment, filled or unfilled.

In Farmers' Bulletin No. 1579, entitled "Containers Used in Shipping Fruits and Vegetables", issued April 1929, revised 1934, published by the Department of Agriculture, the following was said with reference to hampers when used in connection with the shipment of green beans (pp. 6–7):

> Practically all green beans are shipped in hampers, although round stave and tub baskets are used to some extent (fig. 7). There is considerable difference of opinion in various sections as to the best size of

hamper to use for this commodity. Florida and Mississippi and some other parts of the South formerly used the 28-quart hamper, believing any larger size to be too large. Under the Standard Container Act of 1928 the use of this size became illegal after November 1, 1929. Since that date growers have used either the 24-quart or the 32-quart size. The North Carolina and Virginia sections use the 40-quart hamper. New Jersey uses the bushel size. Hampers are also coming into use on the Pacific coast as bean containers.

On page 34 of this report it was said:

> Meanwhile the need for standardizing those types of containers not now regulated in any way on a national scale grows more apparent. The benefits accruing from the Federal standardization of berry baskets, till baskets, Climax baskets, hampers, round- and flat-bottom stave baskets, and splint or market baskets, and barrels, are universally recognized. There seems to be a growing demand that the same principle of standardization be applied to cartons, crates, and boxes for fruits and vegetables. A bill to accomplish this and to consolidate and equalize container legislation has been introduced in Congress.

At the Twenty-fourth National Conference on Weights and Measures held at the Bureau of Standards June 2–5, 1931 (Miscellaneous Publications, No. 129, p. 44 *et seq.*), an address was delivered by H. A. Spilman, Senior Marketing Specialist, Bureau of Agricultural Economics, United States Department of Agriculture, on "Proposed

Consolidation and Amendment of Federal Standard-Container Legislation." In this address there appears (p. 45) the following tabulation, which is particularly interesting because it discloses that the Secretary of Agriculture has approved specifications only for hampers conforming to the standard sizes prescribed by the Act of 1928:

Standard containers—standard container act of 1928

Established standards	Number of shapes or specifications	Variants and types
Hampers:		
⅛-bushel	One	1. Regular flush top. 2. Raised bottom. 3. High hat.
¼-bushel	do	Same as above plus 4. Cross-brace stave. 5. Square hamper.
½-bushel	do	1. Regular flush top. 2. Raised bottom. 3. Cross-brace staves (8 and 8¼ inch bottoms).
⅝-bushel	do	1. Regular. 2. Cross-brace staves.
¾-bushel	Two	1. Based on old ⅞ bushel. 2. Based on old 1 bushel.
1-bushel	Four	1. Regular-set-down hoop. 2. Flush top. 3. 10-inch bottom—storage. 4. Lobart export—13-inch bottom. 5. Oval.
1¼-bushel	One	
1½-bushel	Two	1. 9-inch bottom regular and flush top. 2. 10-inch bottom.

RULES AND REGULATIONS OF THE SECRETARY OF AGRICULTURE UNDER THE UNITED STATES STANDARD CONTAINER ACT OF 1928, PROMULGATED OCTOBER 10, 1928, WITH AMENDMENTS THERETO EFFECTIVE JUNE 1, 1933, AND JANUARY 1, 1936

REGULATION 1—DEFINITIONS

SECTION 1. Words used in these regulations in the singular form shall be deemed to import the plural, or vice versa, as the case may demand.

SEC. 2. For the purpose of these regulations, unless the context otherwise requires, the following terms shall be construed, respectively, to mean:

Paragraph 1. Standard container act of 1928, or the act.—The act entitled "An act to fix standards for hampers, round stave baskets, and splint baskets, for fruits and vegetables, and for other purposes", approved May 21, 1928. (Pub., No. 462, 70th Cong.)

Par. 2. Secretary.—The Secretary of Agriculture of the United States.

Par. 3. Chief of Bureau.—The Chief of the Bureau of Agricultural Economics of the United States Department of Agriculture.

Par. 4. Containers.—Hampers, round stave baskets, or the variants of these types known as straight side or tub baskets, and splint or market baskets for fruits and vegetables.

Par. 4. (5) *Hamper.*—A container, circular, elliptical, or polygonal at top and/or bottom, the top diameter of which is somewhat greater than the bottom and usually less than the depth, having slatted or solid sides ventilated or non-ventilated,

and a fabricated or solid bottom which may be loose or fixed in place, or formed by a continuation of the sides. Amendment effective June 1, 1933.

Par. 6. Round stave basket.—A container usually approximately circular at top and bottom and usually of greater breadth than depth, the sides and bottom of which may be formed from a web of continuous or non-continuous staves or of non-continuous staves and a separate solid or built-up bottom piece which may be loose or fixed. Amendment effective June 1, 1933.

Par. 7. Splint basket.—A container, usually approximately rectangular, the sides and bottom of which are formed from a mat, woven or braided, of continuous narrow staves or splints, or of two or more veneer blanks crossed at right angles.

Par. 8. Dimension specifications.—The numerical designations of inside and outside measurements necessary properly to classify a container as to its capacity, shape, and appearance.

Par. 9. Deceptive appearance.—A basket or hamper the gross dimensions of which are such as to give to the untrained eye the appearance of a greater or lesser capacity than that of a standard container, or which is not readily distinguishable from another standard container, is of deceptive appearance.

REGULATION 2—ADMINISTRATION

SECTION 1. The chief of bureau shall perform, for and under the supervision of the Secretary, such duties as the Secretary may require in enforcing the provisions of this act and these rules and regulations.

REGULATION 3—SPECIFICATIONS

SECTION 1. *Paragraph 1.* In order to comply with section 4 of the act each manufacturer of hampers, round stave baskets and/or splint baskets shall submit specifications therefor to the chief of bureau for his approval, such specifications to be submitted over the manufacturer's signature on forms provided for that purpose.

Par. 2. Manufacturers shall submit dimension specifications for all containers covered by the act which are being made prior to November 1, 1929, and which they wish to continue to make after that date, and dimension specifications shall also be submitted for any such containers which may be developed subsequently, and the manufacture of containers covered by the act shall not be undertaken on and after November 1, 1929, unless and until the specifications therefor have been approved by the chief of bureau.

Par. 3. The chief of bureau will approve all such dimension specifications if he finds that the containers made in accordance therewith are of the proper cubical capacity and are not deceptive in appearance.

Par. 4. The dimension specifications of any container which have been approved under the provisions of the act shall not be changed nor altered in any way without the prior approval of the chief of bureau.

Par. 5. Manufacturers of containers coming under this act shall secure prior approval of speci-

fications for such containers before ordering or obtaining forms therefor.

SEC. 2. The dimension specifications which are approved will be specifically certified by the chief of bureau, and such certificate will bear an identification number which may be used by the manufacturer to whom it is issued in stamping or otherwise marking the container covered by the certificate. Such marking, if used, shall be in accordance with the following style:

708
U. S.
4 qts.

REGULATION 4—CAPACITY AND APPEARANCE

SECTION 1. *Paragraph 1.* For the purpose of determining the capacity of containers and whether or not they are deceptive in appearance, and conform to the dimension specifications which have been submitted therefor, carefully made samples shall be submitted to the chief of bureau at his request.

Par. 2. Such containers when tested and/or measured will be considered satisfactory when the results of said tests and measurements are such as to indicate that the factory run of such containers may reasonably be expected to contain as many over standard as there are under standard capacity, and conform to the approved specifications.

Par. 3. Sample containers referred to in paragraph 1 of this section may be called for prior to the approval of the dimension specifications which

have been submitted therefor, and additional samples may be called for from time to time in the discretion of the chief of bureau for subsequent test as to capacity and conformity with said specifications.

SEC. 2. For the purpose of determining whether or not a container is deceptive in appearance, as provided in section 4 of the act, the dimension specifications for such a container, when submitted by a manufacturer as required by that section, shall be examined by the chief of bureau or his authorized representative and shall be recommended for approval provided the container made in accordance with such specifications is not of deceptive appearance as defined in section 1 of these regulations, and provided further that said container is of the proper cubical capacity as provided in sections 1 and 2 of this act.

REGULATION 5—TOLERANCES AND VARIATIONS

SECTION 1. *Paragraph 1.* Except as hereinafter provided, for the purpose of ascertaining whether a container is within the tolerances and variations as to capacity allowed by these regulations it shall be tested by the bulk-for-bulk method, as described in U. S. D. A. Miscel. Pub. No. 75, or by the dimensional measurement method, which is accomplished by taking the dimensions of the container and from these computing the capacity. Only the actual capacity of the container when level full shall be considered, and such portion of the contents as may be heaped above the level of the top of the sides shall be disregarded notwithstanding any raised

cover which might permit the extension upward of the contents. Amendment effective January 1, 1936.

Par. 2. The capacity of a container which is constructed with the inside top hoop set down to accommodate the cover shall be determined to the top of such inside top hoop. The total capacity shall first be determined in the usual manner and from such total capacity thus obtained there shall be deducted the number of cubic inches contained in the space included between the upper edge of the inside top hoop and the upper ends of the staves. Such computation shall be made by the formula: Diameter squared X 0.7854 X the average depth. Amendment effective Jan. 1, 1936.

SEC. 2. *Paragraph 1.* As prescribed in this section, the following tolerances and variations in the capacities of containers are found to be reasonable and necessary and are hereby allowed.

Par. 2. The excess or deficiency in capacity of any container, over or under the capacity prescribed for such container in the standard container act of 1928, as specified in Table 1 in the column designated "Standard capacity", may be as much as, but not greater than, the amount stated in cubic inches in the same line in the column designated "Excess" or "Deficiency", as the case may be, but, among any lot of containers which are not all of the standard capacity prescribed for such containers by the standard container act of 1928, the number over shall be as nearly equal as may be practical to the number under such standard capacity, within the tolerances and variations allowed therefor in this section.

TABLE 1.—*Schedule of tolerances under the United States standard container act of 1928*

Standard capacity	Tolerances and variations		Standard capacity	Tolerances and variations	
	Excess	Deficiency		Excess	Deficiency
	Cubic inches	*Cubic inches*		*Cubic inches*	*Cubic inches*
1½ bushels	65	33	½ bushel	30	15
1¼ bushels	58	29	12 quarts	23	12
1 bushel	50	25	8 quarts	16	8
¾ bushel	40	20	4 quarts	10	5

Par. 3. In case of a container having a capacity to which a standard is applicable which is not specified in the column headed "Standard capacity" in Table 1, the excess or the deficiency allowed shall be that permitted for the next smaller standard capacity specified in the table, but this shall not apply to containers for which variations and tolerances shall be permitted and established under the act entitled "An act to fix the standard barrel for fruits, vegetables, and other dry commodities", approved March 4, 1915 (38 U. S. Stats. L., p. 1186), when such variations and tolerances become effective.

SEC. 3. *Par. 1.* In the case of Splint Baskets for fruits and vegetables the following basket and form dimensions and material specifications for each of the several standard sizes, respectively, are hereby standardized for the purpose of the application of tolerances. Amendment effective January 1, 1936.

Square braid and slab overhandle splint baskets, standard basket, form, and material specifications

Standard sizes Cubic inches	4-qt. 268.8	8-qt. 537.6	12-qt. 806.4	16-qt. 1,075.2	24-qt. 1,612.8	32-qt. 2,150.4
BASKET DIMENSIONS	*Inches*	*Inches*	*Inches*	*Inches*	*Inches*	*Inches*
Depth, at corners	4	5	6	7	8 3/16	8 3/16
Top center:						
Width	5 1/2	7 1/4	7 3/4	8	9	10 1/16
Length	13	15 1/16	17 3/4	19 1/2	22 3/4	22 3/4
Top corners:						
Width	5 5/16	7 1/16	8	8	9 1/4	11
Length	12 1/16	15 3/4	16 3/4	18 3/4	21 1/2	22 1/16
Bottom:						
Width	5 3/16	6 7/16	7 3/16	8	9 3/16	11
Length	11 3/16	15 1/16	16 1/4	17 9/16	19 3/16	22
Handle: Length	16 3/4	21	24 1/2	25 1/2	28 3/4	31 1/4
Placement of ends [1]						
FORM DIMENSIONS						
Depth, at ends	4	5	6	7	8 3/16	8 3/16
Top:						
Width	6	7	8	8 3/16	10 3/16	11
Length	12	15 3/16	16 1/2	18 3/16	21 3/16	21 3/16
Circumference	36	45	49	53	58 1/2	65
MATERIAL SPECIFICATIONS						
Inside top bands (when scored):						
Distance between scores:						
Width	6	7 3/16	8 3/16	8 3/16		11
Length	12	15 3/16	16 1/2	18 3/16		22 1/16
SHORT AND LONG SPLINTS (STANDARDS)						
Scored from each end	4	5	6	7	8 3/16	8 3/16
Distance between scores:						
Short	5 7/16	6 15/16	7 13/16	8 11/16	9 3/4	11 1/16
Long	11 7/16	15 3/16	16 5/16	17 5/16	19 7/16	22 1/16
Handle, length	17	21 3/4	24 3/4	25 3/4	28 1/2	31 1/2

[1] Ends of handle shall extend to bottom of basket.

(Amendment effective January 3, 1936.)

PAR. 2. Any Splint Basket, no dimension of which is in error by more than the tolerance given below for the proper standard size, or, any Splint Basket which is constructed of standard material and on a standard form no dimension of which, respectively, is in error by more than the tolerance given below for the proper standard size, will be

deemed to be not deceptive in appearance and within the tolerance allowed: Provided, that not more than one dimension of any splint basket, splint basket form, or splint basket material, respectively, shall be in error in the same direction.

In these regulations an error on a dimension shall be construed as the difference between the actual measured dimension and the standard dimension. An error in excess is to be indicated when the measured dimension is greater than the standard dimension. An error in deficiency is to be indicated when the measured dimension is less than the standard dimension.

Tolerances and variations, standard square brain and slab splint baskets, baskets, forms, and material

		Excess or deficiency
BASKET DIMENSIONS		
Depth	All sizes	1/16 inch.
Combined width and length:		
Top center	4, 8, and 32-qt. sizes	1/2 inch.
Do	12, 16, and 24-qt. sizes	3/4 inch.
Combined width and length:		
Top corners	4, 8, and 32-qt. sizes	1/2 inch.
Do	12, 16, and 24-qt. sizes	3/4 inch.
Bottom:		
Width	All sizes	1/8 inch.
Length	do	1/8 inch.
Handle:		
Length	do	1/2 inch.
Placement of ends	do	None.
FORM DIMENSIONS		
Depth	do	1/16 inch.
Top:		
Width	do	1/8 inch.
Length	do	1/8 inch.
Circumference	do	1 inch.
MATERIAL SPECIFICATIONS		
Inside top bands (when scored): Scored dimensions.	do	1/16 inch.
Short and long splints (standards): Scored dimensions.	do	1/16 inch.
Handle: Length	do	1/2 inch.

(Amendment effective January 1, 1936.)

PAR. 3. Any splint basket for fruits and vegetables one or more dimensions of which are in error by more than the tolerances given above, or which is constructed of material or on a form one or more dimensions of which, respectively, are in error by more than the tolerances given above, shall be deemed to be outside the tolerance allowed by this section, and shall be subject to the tests prescribed in Section 1, and to the tolerances provided for in Section 2, of these Regulations. (Amendment effective January 1, 1936.)

U. S. GOVERNMENT PRINTING OFFICE: 1936

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. [redacted] 62

THE UNITED STATES OF AMERICA,
Appellant,

vs.

CHARLES RESNICK AND JOSEPH RESNICK, PARTNERS, TRADING AS L. RESNICK AND SONS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JOHN ARTHUR BROWN,
S. L. EDELHORN,
Counsel for Appellees.

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IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUNE TERM, 1935

No. 6688

UNITED STATES OF AMERICA

vs.

CHARLES RESNICK AND JOSEPH RESNICK, PARTNERS, TRADING AS L. RESNICK & SONS.

STATEMENT OF APPELLEES AGAINST JURISDICTION.

(Filed April 24, 1936.)

Pursuant to Rule 12, Paragraph 3, of the Supreme Court of the United States, Charles Resnick and Joseph Resnick, partners, trading as L. Resnick & Sons, submit herewith their statement showing the matters or grounds making against the jurisdiction of the Supreme Court asserted by the United States, appellant in this cause:

A. The statutory provision relied upon by appellant to sustain the jurisdiction of the Supreme Court in this cause is the Criminal Appeals Act of March 2, 1907, Chapter

2564, 34 Stat. 1246, Title 18, Section 682 of the United States Code, which provides in part as follows:

> "The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases."

The decision in this cause was rendered by the District Court in an opinion filed March 11, 1936, and in which opinion the demurrer to the indictment was sustained.

The appellees call attention to the petition for appeal filed by appellant wherein appellant prays for leave to appeal to the Supreme Court of the United States for a reversal of the judgment and order made on March 11, 1936.

The appeal in this cause was taken on April 14, 1936. It appears, therefore, from the record sought to be reviewed, that the appeal was not taken within thirty days after the decision had been rendered. The mere entry of the Order of April 14, 1936, by the District Court sustaining the demurrer a second time does not extend the time within which the appeal must be taken.

B. The District Court construed the Act of May 21, 1928, Chapter 664, 45 Stat. 685, Title 15, Sections 257-257 (i), of the United States Code, to be inapplicable to the manufacture and sale of two quart size hampers for fruits and vegetables. A similar construction has heretofore been given this statute by the Supreme Court. In *Pacific States Box and Basket Company* v. *White,* 296 U. S. 176, the Supreme Court held that the provisions of this statute were inapplicable to a pint size container for raspberries and strawberries in the following language:

> "The Standard Baskets and Containers Act of May 21, 1928, c. 664, 45 Stat. 685 (15 U. S. C. A., Sec. 257 et seq.), has no relation to the matter here under consideration. That statute deals solely with hampers,

round stave and splint baskets of capacity not less than one-eighth bushel.

In compliance with Rule 12, Paragraph 3, and Rule 7, paragraph 4 of the Supreme Court of the United States the appellees include in this opposing statement the following motion to affirm, which is united in the alternative with the following motion to dismiss:

Motion to Dismiss.

The appellees move the Court to dismiss the appeal filed herein for the following reason:

1. The appeal was not taken within thirty days after the decision had been rendered by the District Court as provided in the Criminal Appeals Act of March 2, 1907, Chapter 2564, 34 Stat. 1246, Title 18, Section 682 of the United States Code.

Motion to Affirm.

In the event that the aforesaid motion to dismiss is not granted, the appellees move the Court to affirm the decision of the District Court sustaining the demurrer to the indictment for the following reasons:

1. The questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

2. The construction by the District Court of the statute upon which the indictment is founded is the same construction previously given the statute by the Supreme Court.

Respectfully submitted,

JOHN ARTHUR BROWN,
S. L. EINHORN,
Attorneys for L. Resnick & Sons.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 62.

UNITED STATES OF AMERICA, Appellant

v.

CHARLES RESNICK and JOSEPH RESNICK, Partners, Trading as L. RESNICK AND SONS.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLEES.

SAMUEL L. EINHORN,
Attorney.

OCTOBER 1936.

ALLEN, LANE & SCOTT, PRS. PHILADELPHIA.

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CITATIONS.

CASES:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936. No. 62.

United States of America, Appellant,

v.

Charles Resnick and Joseph Resnick, Partners, Trading as L. Resnick and Sons.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLEES.

OPINION BELOW.

The opinion of the District Court appears at R. 4-7 and has not yet been reported.

JURISDICTION.

The decision of the District Court sustaining the demurrer to the indictment was entered on March 11,

1936 (R. 7). The appeal to this Court was applied for and allowed on April 14, 1936 (R. 7 and 8). The statutory provision relied on by Appellant to sustain the jurisdiction of this Court is the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, sec. 682), and under Section 238 of the Judicial Code as amended by Act of February 13, 1925 (U. S. C., Title 28, sec. 345). On April 24, 1936, Appellees filed their statement against the jurisdiction, pursuant to Rule 12, par. 3 of this Court. On June 1, 1936, this Court postponed further consideration of the question of its jurisdiction in this case to the hearing of the case on its merits.

QUESTIONS PRESENTED.

1. Whether the action of the District Court on March 11, 1936, was a "decision or judgment * * * sustaining a demurrer" so that the Government's appeal taken on April 14, 1936, was beyond the thirty day period allowed.

2. Whether the manufacture and sale of two-quart metal hampers for fruits and vegetables are prohibited by the Standard Container Act of 1928.

3. If so, whether the provision of such Act as applied to the facts set forth in the indictment are constitutional.

STATUTES INVOLVED.

The Standard Container Act of 1928, c. 664, 45 Stat. 685 (U. S. C., Title 15, Secs. 257-257 (i)), together with the pertinent provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1245 (U. S. C., Title 18, Sec. 682), are printed in the Government's brief, Appendix A, pp. 35-41.

STATEMENT.

Appellees contend that the demurrer was sustained by the District Court on March 11, 1936 (R. 1 and R. 7). The issues in this case were framed upon the grounds set forth in Appellees' demurrer to the indictment (R. 3-4). However, the Court below did not in its opinion consider the Constitutionality or the intrastate character of the business. Appellees were not in custody nor were they under bond to appear at any time before or after April 14, 1936, when the District Court purported to discharge them (R. 7).

DISCUSSION.

As this case presents the identical questions involved in United States of America, Appellant *v.* The Acme Can Company, No. 63, October Term, 1936, which will be argued with the present case, the Court is respectfully referred to the brief in The Acme Can Company case for a discussion of the Appellees' contentions.

CONCLUSION.

For the reasons stated in the brief in The Acme Can Company case, it is respectfully submitted that the decision in the Court below should be affirmed.

SAMUEL L. EINHORN,
Attorney.

OCTOBER, 1936.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 62

THE UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES RESNICK AND JOSEPH RESNICK, PARTNERS, TRADING AS L. RESNICK AND SONS

No. 63

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE ACME CAN COMPANY

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES IN REPLY TO BRIEFS FOR APPELLEES

I

The argument of the appellees that the opinion of March 11, 1936, was a final decision or judgment ignores the fact that it was not so regarded by the court and was not so entered by the clerk.

By the court it was denominated "Opinion sur demurrer" (R. 4). Like all opinions it forecast the judgment to be entered, but did not in form or substance constitute or resemble an appealable decision or judgment. The clerk did not enter it as a judgment but merely filed it as an opinion (R. 1, 4).

II

The Standard Container Act of 1928 in unequivocal and unambiguous terms prescribes nine standard sizes of hampers for fruits and vegetables, and forbids the manufacture or sale of all non-standard hampers of whatever size. As pointed out in the Government's brief in the *Resnick* case (pp. 23 *et seq.*) this clear intent is emphasized by the legislative history of the Act which forecloses the strained and unnatural construction contended for by the appellees.

III

In the District Court the appellees by demurrer assailed the constitutionality of the Standard Container Act of 1928 as beyond the power of Congress (Resnick, R. 4; Acme, R. 3). The court stated in its opinion that this ground of demurrer was not "stressed at the argument" (Resnick, R. 7), but that in any event it was without merit (Resnick, R. 7; Acme, R. 4). The appellees here attempt again to urge that because the Standard Container Act of 1928 is not confined to transactions in interstate and foreign commerce, it invades a field of legislation reserved to the several States.

This question, we believe, is not presented for review on this appeal, and in any event the contention urged is devoid of merit.

A. QUESTIONS DECIDED AGAINST DEFENDANTS ARE NOT WITHIN THE JURISDICTION CONFERRED BY THE CRIMINAL APPEALS ACT

The Criminal Appeals Act of March 2, 1907, provides for appeal "by and on behalf of the United States" from decisions holding an indictment bad, or arresting a judgment of conviction, because of the invalidity or construction of the statute upon which the indictment is founded, and also from decisions "sustaining a special plea in bar" when the defendant has not been placed in jeopardy.

Prior to the enactment of the Criminal Appeals Act the Government had no opportunity to obtain review of questions of law which were decided against it in the court of first instance. *United States* v. *Sanges,* 144 U. S. 310. The purpose of the Act was to remedy this situation, which often resulted in the inability to enforce a valid statute. The Act did not represent the judgment of Congress that the decisions specified were of such importance that immediate review by the Supreme Court was desirable, irrespective of which party obtained the decision below. Its sole purpose was to make appellate review possible "wherein the United States had been deprived of a remedy against wrongdoers." See House Rep. No. 2119, 59th Cong., 1st Sess. See *United States* v. *Bitty,* 208 U. S. 393, 400; *United States* v. *Stevenson,* 215

U. S. 190, 195–196. Accordingly, the jurisdiction of this Court is limited to an appeal "taken by and on behalf of the United States." See *United States* v. *Bitty, supra,* 399–400; *United States* v. *Heinze,* 218 U. S. 532, 545–546. It seems plain that the jurisdiction of this Court does not extend to questions decided in favor of the United States, which may be reviewed in the normal manner after conviction.

The Act confers a special and limited jurisdiction, and the Court may not examine the whole case when a question has been appealed under this Act. *United States* v. *Keitel,* 211 U. S. 370, 398–399; *United States* v. *Mason,* 213 U. S. 115, 122; *United States* v. *Mescall,* 215 U. S. 26, 31; *United States* v. *Kissel,* 218 U. S. 601, 606. It follows that the general rule, that any ground may be urged in support of the judgment below, *Langnes* v. *Green,* 282 U. S. 531, 537–538, is inapplicable to cases arising under this Act.

B. THE STANDARD CONTAINER ACT OF 1928 IS VALID AS A PROPER EXERCISE OF CONGRESSIONAL POWER

The Constitution (Article I, Section 8, Clause 3) provides that Congress shall have power "To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures."

The argument that the power to fix a standard does not connote the power to prohibit non-standard weights and measures is rested on a too narrow

view of the law. This Court in a long line of well reasoned opinions has held that constitutional grants of power to Congress are to be liberally construed. Likewise, it is settled that a grant of power carries with it the power to do all things necessary or appropriate to carry out the granted power. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Legal Tender Cases,* 12 Wall. 457, 531 et seq.; *Northern Securities Co.* v. *United States,* 193 U. S. 197, 336.

The power to fix a standard of weights and measures would indeed be an empty thing without the incidental and necessary power to compel observance of the standard prescribed.

The Standard Container Act of 1916 (U. S. C., Title 15, Sec. 251 *et seq.*) did, it is true, prescribe certain standards for containers for fruits and vegetables. For such containers, other than Climax baskets, it, however, permitted a wide deviation in size and shape and imposed the sole restriction that each container should be in capacity a multiple of the dry quart.

Twelve years of experience having demonstrated the benefits of even the limited standardization prescribed by the 1916 Act (Gov. Br., pp. 26 *et seq.*), Congress, by the Act of 1928, fixed new and more definite standards for certain measures or containers for fruits and vegetables. It fixed the bushel containing two thousand one hundred and fifty and forty-two hundredths cubic inches as the standard

for hampers, round stave baskets, and splint baskets for fruits and vegetables. It permitted certain fractional sizes of such measures or containers and provided for a two-bushel hamper as the maximum and a one-eighth bushel hamper as the minimum size permitted.

To more completely assure compliance with the standards fixed, the Act requires approval of specifications.

All these provisions, it is submitted, are appropriate to the exercise of the power to "fix a standard of weights and measures."

The contention that a container is not a measure and that Congress has no power to fix a standard for containers ignores the teachings of experience. Quart and pint bottles for milk are not only containers but commonly the only used and available measures of quantity. Boxes for apples, barrels for cranberries, hampers, baskets, and containers of various kinds, sizes, and dimensions have long been used as units of measurement. It is as futile to say that a two-quart hamper is not a measure of quantity as it is to argue that a one-quart measure is not a container.

The uniform course of the State decisions is persuasive that our contention is correct. See *McLean* v. *State,* 81 Ark. 304; *State* v. *Belle Springs Creamery Co.,* 83 Kan. 389; *People* v. *City of Rochester,* 45 Hun. (N. Y. Sup.) 102; *State* v. *Cooperative Store Co.,* 123 Tenn. 399; *City of Seattle* v.

Goldsmith, 73 Wash. 54; *State* v. *Peel Splint Coal Co.,* 36 W. Va. 802.

Respectfully submitted.

STANLEY REED,
Solicitor General.
BRIEN MCMAHON,
Assistant Attorney General.
WILLIAM W. BARRON,
W. MARVIN SMITH,
Attorneys.

NOVEMBER 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

In the District Court of the United States for the Eastern District of Pennsylvania

JUNE SESSIONS 1935

No. 6665

UNITED STATES OF AMERICA

v.

THE ACME CAN COMPANY

STATEMENT OF JURISDICTION

(Filed April 14, 1936)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the UNITED STATES OF AMERICA submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Sec. 682, of the United States Code, otherwise known as the "Criminal Appeals Act", and by Section 345, Title 28, of the United States Code.

B. The Statute of the United States, the construction of which is involved herein, is the Stand-

ard Container Act of May 21, 1928, 45 Stat. 685, Chap. 664, (15 U. S. C. A., Secs. 257–257 (i)), the pertinent parts of which are as follows:

SEC. 1. That the standard hampers and round stave baskets for fruits and vegetables shall be of the following capacities: One-eighth bushel, one-fourth bushel, one-half bushel, one bushel, one-and-one-fourth bushels, one-and-one-half bushels, and two bushels, which, respectively, shall be of the cubic content set forth in this section. For the purposes of this Act a bushel, standard dry measure, has a capacity of two thousand one hundred and fifty and forty-two one-hundredths cubic inches.

(a) The standard one-eighth bushel hamper or round stave basket shall contain two hundred and sixty-eight and eight-tenths cubic inches.

* * * * *

SEC. 5. That it shall be unlawful to manufacture for sale or shipment, to offer for sale, to sell, to offer for shipment, or to ship, hampers, round stave baskets, or splint baskets for fruits or vegetables, either filled or unfilled, or parts of such hampers, round stave baskets, or splint baskets that do not comply with this Act: *Provided,* That this Act shall not apply to Climax baskets, berry boxes, and till baskets which comply with the provisions of the Act approved August 31, 1916, entitled "An Act to fix standards for Climax baskets for grapes and other fruits

and vegetables, and to fix standards for baskets and other containers for small fruits, berries, and vegetables, and for other purposes" (Thirty-ninth United States Statutes At Large, page 673, and the regulations thereunder). Any individual, partnership, association, or corporation that violates this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding $500.

C. The judgment of the District Court sought to be reviewed was entered on April 14, 1936, and an application for appeal was filed on April 14, 1936, and is presented to the District Court herewith, to wit: on this, the 14th day of April 1936.

The Indictment in this case is in four separate counts, each of which counts is based upon Sections 1 and 5 of the Standard Container Act of 1928 (United States Code, Title 15, Secs. 257 and 257 (d)) and charges in substance that the defendant, THE ACME CAN COMPANY, on the days named, did knowingly, wilfully, and unlawfully manufacture and sell for fruits and vegetables, certain two-quart metal hampers which did not comply with the provisions of the Standard Container Act of May 21, 1928, in that they were not of any standard size authorized by the Act for hampers for fruits and vegetables and were not within any tolerances established by the Secretary of Agriculture pursuant to the Act of hampers so standardized. A demurrer to the Indictment was filed by the de-

fendant, THE ACME CAN COMPANY, and at the hearing thereof the Court construed the provisions of the Statute as being inapplicable to the sale of two-quart size hampers for fruits and vegetables. In its written opinion, the court held that the Act makes neither provision nor penalty for using a container of less than one-eighth (four quarts) of a bushel. The court further held that the constitutionality of the Act was not involved and that the sustaining of the demurrer was not based on the intra-state character of the business.

The following decisions are believed to sustain the jurisdiction of the Supreme Court:

United States v. *Heinze,* 218 U. S. 532.
United States v. *Hastings,* 296 U. S. 188.
United States v. *Bitty,* 208 U. S. 393, 399.
United States v. *Keitel,* 211 U. S. 370.

Respectfully submitted.

(Sgd.) CHARLES D. MCAVOY,
United States Attorney.

In the District Court of the United States for the Eastern District of Pennsylvania

JUNE SESSIONS, 1935

No. 6665

UNITED STATES OF AMERICA

v.

THE ACME CAN COMPANY

STIPULATION

(Filed May 4, 1936)

AND NOW, to wit: this 28th day of April 1936, it is hereby STIPULATED and AGREED by and between CHARLES D. MCAVOY, United States Attorney for the Eastern District of Pennsylvania, counsel for the plaintiff, and STANLEY B. COOPER, Esquire, counsel for the defendant above named, as follows:

1. That the last paragraph on page two of the "Statement of Jurisdiction" be amended Nunc Pro Tunc to read as follows:

> The Indictment in this case is in two separate counts, each of which counts is based upon Sections 1 and 5 of the Standard Container Act of 1928 (United States Code Title 15, Secs. 257 and 257 (d)), and charges in substance that the defendant, THE ACME CAN COMPANY, on the days named, did knowingly, wilfully, and unlawfully

manufacture and sell for fruits and vegetables, certain two-quart metal hampers which did not comply with the provisions of the Standard Container Act of May 21, 1928, in that they were not of any standard size authorized by the Act for hampers for fruits and vegetables and were not within any tolerances established by the Secretary of Agriculture pursuant to the Act for hampers so standardized. A Demurrer to the Indictment was filed by the defendant, THE ACME CAN COMPANY, and at the hearing thereof the Court construed the provisions of the Statute as being inapplicable to the manufacture and sale of two-quart size hampers for fruits and vegetables. In its written opinion, the court held that the Act makes neither provision nor penalty for using a container of less than one-eighth (four quarts) of a bushel. The Court further held that the constitutionality of the Act was not involved and that the sustaining of the demurrer was not based on the intrastate character of the business.

2. That the second paragraph of the Assignment of Errors be Amended Nunc Pro Tunc to read as follows:

That the Court committed material error against plaintiff in sustaining said Demurrer in holding that the provisions of the Standard Container Act of May 21, 1928, are inapplicable to the manufacture and sale of two-quart size metal hampers for fruits and vegetables.

This Stipulation is entered into without prejudice to the right of the defendant above named to question the correctness of the Statement of Jurisdiction as amended, or to object to the time within which the appeal was taken.

(Sgd.) CHARLES D. MCAVOY,
United States Attorney.

(Sgd.) STANLEY B. COOPER,
Attorney for Defendant.

Approved by the Court:

(Sgd.) WELSH, *J.*

U. S. GOVERNMENT PRINTING OFFICE: 1938

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

THE ACME CAN COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE APPELLEE'S MOTION TO DISMISS OR AFFIRM

In its statement making against jurisdiction in the instant case the appellee has included a motion to dismiss or affirm which is identical in all respects with that filed by the appellees in *United States, Appellant* v. *Charles Resnick and Joseph Resnick, Partners, Trading as L. Resnick & Sons* (No. ——, present term). As the pertinent facts are identical in the two cases, the Government feels that it is unnecessary to do more in the instant case than to make reference to its brief in opposition to the motion to dismiss or affirm in the *Resnick* case, which discusses at length the contentions urged by the appellee herein.

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For the reasons stated in the Government's brief in opposition to the motion to dismiss or affirm in the *Resnick* case, we respectfully submit that the motion to dismiss or affirm in the present case should be denied.

STANLEY REED,
Solicitor General.
BRIEN MCMAHON,
Assistant Attorney General.
WILLIAM W. BARRON,
W. MARVIN SMITH,
Attorneys.

MAY 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 63

UNITED STATES OF AMERICA, APPELLANT

v.

THE ACME CAN COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the District Court appears at R. 4.

JURISDICTION

The order of the District Court sustaining the demurrer to the indictment was entered April 14, 1936 (R. 4). The appeal to this Court was applied for and allowed on the same day (R. 5–6). The jurisdiction of this Court is invoked under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and under

Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 345). On June 1, 1936, this Court postponed further consideration of the question of its jurisdiction in this case to the hearing of the case on the merits.

QUESTIONS PRESENTED

1. Whether the filing of an opinion by the court below in sustaining a demurrer to the indictment was a rendition of its "decision or judgment" within the meaning of the Criminal Appeals Act, so that an appeal was required to be taken within 30 days thereafter rather than within 30 days after the entry of the order sustaining the demurrer.

2. Whether the manufacture and sale of two-quart hampers for fruits and vegetables is in contravention of the Standard Container Act of 1928.

STATUTES INVOLVED

The statutes involved are printed in the Appendix to the Government's brief in the case of *United States of America, Appellant* v. *Resnick,* No. 62, which will be argued with the present case.

STATEMENT

On September 11, 1935, the appellee was indicted in the United States District Court for the Eastern District of Pennsylvania on two counts charging the manufacture and sale of two-quart metal hampers in violation of the Act of Congress of

May 21, 1928, otherwise known as the Standard Container Act of 1928 (R. 1–2).

The appellee demurred to this indictment on the ground, among others, that the Act did not apply to the manufacture and sale of two-quart hampers (R. 3).

On March 11, 1936, the District Court filed a memorandum opinion in which it held that its opinion in the *Resnick* case was controlling and that the demurrer should be sustained (R. 4). The only ground upon which the court sustained the demurrer in the *Resnick* case was that the Act of 1928 did not apply to hampers of a smaller size than one-eighth of a bushel or 4 quarts. On April 14, 1936, the District Court entered its order sustaining the demurrer to the indictment and discharging the appellee (R. 4). On the same day the Government petitioned for an appeal (R. 5), filing with its petition an assignment of errors (R. 6) and a statement of jurisdiction pursuant to Rule 12 of this Court. Also on the same day the District Court allowed the appeal (R. 5). Thereafter a statement opposing jurisdiction was filed below by the appellee, in which it moved to dismiss the appeal on the ground that the appeal was not taken in time because not applied for within 30 days after the rendition of the opinion of the District Court on March 11, 1936, and in which it also, in the event that its motion to dismiss was denied, moved to affirm on the ground that the question

of the construction of the statute was not substantial because the District Court had given the same construction to the statute as had this Court in *Pacific States Co.* v. *White,* 296 U. S. 176. In reply, the Government filed a memorandum in opposition to the motion to dismiss or affirm. On June 1, 1936, this Court postponed further consideration of the question of its jurisdiction to the hearing of the case on the merits.

SPECIFICATION OF ERRORS TO BE URGED[1]

1. The District Court erred in holding that the Standard Container Act of 1928 was inapplicable to the manufacture and sale of two-quart size hampers for fruits and vegetables.

2. The District Court erred in sustaining the demurrer to the indictment.

DISCUSSION

As this case presents the identical questions which are involved in the case of *United States of America, Appellant* v. *Resnick,* No. 62, which will be argued with the present case, the Court is respectfully referred to the Government's brief in the *Resnick* case for a discussion of the Government's contentions.

CONCLUSION

For the reasons stated in the Government's brief in the *Resnick* case, it is respectfully submitted

---

[1] See stipulation, approved by the District Court, amending Government's assignment of errors *nunc pro tunc* (R. 8).

that the judgment of the court below sustaining the demurrer to the indictment in the instant case should be reversed.

STANLEY REED,
Solicitor General.
BRIEN MCMAHON,
Assistant Attorney General.
WILLIAM W. BARRON,
W. MARVIN SMITH,
Attorneys.

OCTOBER 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. [redacted] 63

THE UNITED STATES OF AMERICA,

Appellant,

vs.

THE ACME CAN COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JOHN ARTHUR BROWN,
Counsel for Appellee.

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IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUNE TERM, 1935

No. 6665

UNITED STATES OF AMERICA

vs.

THE ACME CAN COMPANY.

STATEMENT MAKING AGAINST JURISDICTION.

(Filed April 24, 1936.)

In compliance with Rule 12, Paragraph 3, of the Supreme Court of the United States, The Acme Can Company submits herewith its statement showing the matters or grounds making against the jurisdiction of the Supreme Court asserted by the United States of America, appellant in this cause:

A. The statutory provision relied upon by appellant to sustain the jurisdiction of the Supreme Court in this cause is the Criminal Appeals Act of March 2, 1907, Chapter 2564, 34 Stat. 1246, Title 18, Section 682 of the United States Code, which provides in part as follows:

> "The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases."

The decision in this cause was rendered by the District Court in the opinion filed March 11, 1936, which opinion is as follows:

> "In view of the similarity between this case and that of the *United States of America* v. *Charles Resnick* and *Joseph Resnick*, partners, trading as *L. Resnick & Sons*, June Term, 1935, No. 6688, the opinion filed March 11, 1936 in the latter case controls in this case.
>
> The demurrer to the indictment is sustained."

The appellee calls attention to the Petition for Appeal filed by appellant wherein appellant prays for leave to appeal to the Supreme Court of the United States for a reversal of the judgment and order made on March 11, 1936.

The appeal in this cause was taken on April 14, 1936. It appears, therefore, from the record sought to be reviewed, that the appeal was not taken within thirty days after the decision had been rendered. The mere entry of the Order of April 14, 1936 by the District Court sustaining the demurrer a second time does not extend the time within which the appeal must be taken.

B. The District Court construed the Act of May 21, 1928, Chapter 664, 45 Stat. 685, Title 15, Sections 257-257 (i), of the United States Code, to be inapplicable to the manufacture and sale of two quart size hampers for fruits and vegetables. A similar construction has heretofore been given this statute by the Supreme Court. In *Pacific States Box and Basket Company* v. *White*, 296 U. S. 176, the Supreme Court held that the provisions of this statute were inapplicable to a pint size container for raspberries and strawberries in the following language:

> "The Standard Baskets and Containers Act of May 21, 1928, c. 664, 45 Stat. 685 (15 U. S. C. A., Sec. 257 *et seq.*), has no relation to the matter here under con-

sideration. That statute deals solely with hampers, round stave, and splint baskets of capacity not less than one-eighth bushel."

In compliance with Rule 12, Paragraph 3, and Rule 7, Paragraph 4, of the Supreme Court of the United States the appellee includes in this opposing statement the following motion to affirm, which is united in the alternative with the following motion to dismiss:

Motion to Dismiss.

The appellee moves the Court to dismiss the appeal filed herein for the following reason:

1. The appeal was not taken within thirty days after the decision had been rendered by the District Court as provided in the Criminal Appeals Act of March 2, 1907, Chapter 2564, 34 Stat. 1246, Title 18, Section 682 of the United States Code.

Motion to Affirm.

In the event that the aforesaid Motion to Dismiss is not granted, the appellee moves the Court to affirm the decision of the District Court sustaining the demurrer to the indictment for the following reasons:

1. The questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

2. The construction by the District Court of the Statute upon which the indictment is founded is the same construction previously given the statute by the Supreme Court.

Respectfully submitted,

(Sgd.) JOHN ARTHUR BROWN,
Attorney for The Acme Can Company.

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No. 63.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

UNITED STATES OF AMERICA, APPELLANT

v.

THE ACME CAN COMPANY.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE ACME CAN COMPANY.

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA.

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE ACME CAN COMPANY.

OPINION BELOW.

The memorandum opinion of the District Court (R. 4) has not been reported.

JURISDICTION.

Whether or not the Government Appeal, taken on April 14, 1936 (R. 5-6), was in time to give this Court jurisdiction, is one of the questions now pre-

sented for decision. The answer to this question depends upon the construction to be placed upon the District Court's actions of March 11, 1936, and April 14, 1936 (R. 4). The applicable statutes are the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (18 U. S. C. A. 682), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A. 345).

QUESTIONS PRESENTED.

1. Whether the action of the District Court on March 11, 1936, was a "decision or judgment * * * sustaining a demurrer" so that the Government's appeal taken on April 14, 1936, was beyond the 30 day period allowed.

2. Whether the manufacture and sale of two-quart metal hampers for fruits and vegetables are prohibited by the Standard Container Act of 1928.

3. If so, whether the provisions of such Act as applied to the facts set forth in the indictment are constitutional.

STATUTES INVOLVED.

The statutes directly involved are printed in Appendix A to the Government's brief, pp. 35-41 in

the case of *United States of America, Appellant,* v. *Resnick,* No. 62, which will be argued with the present case. The provisions of the Standard Container Act of 1916, c. 426, 39 Stat. 673 (15 U. S. C. A. 251 to 256), as well as the clause of the Constitution relating to weights and measures, are set forth in the appendix hereto annexed.

STATEMENT.

The sale charged in the indictment was an intra state sale (R. 2). Appellee's demurrer to the indictment (R. 3) expressly raised the question of the constitutionality of the Standard Container Act of 1928 as applied to the facts set forth in the indictment. The opinion of the District Court holding the Standard Container Act of 1928 inapplicable to the container in this case made it unnecessary for it to decide the constitutional question presented by the demurrer.

On March 11, 1936, the District Court not only filed a memorandum opinion in which it held that its opinion in the *Resnick* case was controlling, but it also in a separate paragraph stated "The demurrer to the indictment is sustained" (R. 4).

No representatives of appellee were in custody nor was it under bond to appear at any time before or after April 14, 1936, when the District Court purported to discharge it (R. 1, 4).

CONTENTIONS OF APPELLEE.

The appellee submits the following contentions:

1. That the action of the District Court on March 11, 1936, when it stated "The demurrer to the indictment is sustained," was a "decision or judgment * * * sustaining a demurrer" as provided for in the Criminal Appeals Act, and the Government Appeal taken on April 14, 1936, was beyond the 30 day period allowed by such Act.

2. That the Standard Container Act of 1928 properly construed has no application to the manufacture or sale of a two-quart metal hamper for fruits and vegetables.

3. That if the Standard Container Act of 1928 be construed as prohibiting the manufacture or intra state sale of a two-quart metal hamper for fruits and vegetables, it is unconstitutional.

ARGUMENT.

I.

THE ACTION OF THE DISTRICT COURT ON MARCH 11, 1936, WAS A DECISION OR JUDGMENT AND THE GOVERNMENT APPEAL ON APRIL 14, 1936, WAS NOT TIMELY.

The narrow question before the Court on this point is whether or not the action of the District Court on March 11, 1936 (R. 4), formally entered of record in the case (R. 1), was a "decision or judgment * * * sustaining a demurrer" as provided for

in the Criminal Appeals Act. If it was, the Government Appeal on April 14, 1936, was not taken within the 30 day period allowed. The action of the Court on March 11, 1936, reads as follows (R. 4):

> "WELSH, *J.*: In view of the similarity between this case and that of the United States of America *vs.* Charles Resnick and Joseph Resnick, partners, trading as L. Resnick & Sons, June Term, 1935, No. 6688, the opinion filed March 11, 1936, in the latter case controls in this case.
>
> "The demurrer to the indictment is sustained."

With all the attention devoted to the question of jurisdiction in the Government's Brief in the *Resnick* case, it appears significant that nowhere in it is the above language set forth verbatim and nowhere is there a forthright argument that such a statement is not a decision or judgment. Government counsel have chosen rather to yield themselves the very matter in controversy by assuming the foregoing to be nothing but an opinion giving the reasons of the Court, from which assumption they then proceed at length to expose the fallacy of regarding mere reasoning of a court as a decision. Appellee agrees that reasoning without a present order is not a decision or judgment and most if not all of Government counsel's argument on this point may be accepted as a correct statement of the law, but the assumption on which it is built is so obviously false as to apparently make it appear inadvisable to the Government to discuss it. This action of the District Court on March 11, 1936,

falls squarely within the definitions given by the Government in its *Resnick* Brief for a decision or judgment. The second paragraph of such action was "so worded as to express the final sentence of the court on the matters contained in the record and to end the case at once, without contemplating any further judicial action," *G. Amsinck & Co.* v. *Springfield Grocer Co.*, 7 F. (2d) 855, 858, (C. C. A. 8th), (Gov't Brief, p. 12—this and all references hereafter being to the Gov't Brief in the *Resnick* case). And to paraphrase another portion of the quotation from the same (Gov't Brief, p. 13):

> "The memorandum claimed to constitute a judgment does * * * purport to be the final judicial act. * * * it does [not] provide that there *shall be* a judgment according to the opinion of the court—[but] * * * that there *is* a judgment by the instrument filed. * * * execution could have been issued thereon— * * * [and an] appeal taken therefrom. It was [not] merely an order for a judgment."

The action of the District Court on March 11, 1936, was both a statement of reasons and a decision. This appears from the separation by paragraphing between the two portions of the Court's action, one giving the reasons and the other the decision, as well as from the fact that the action expressed is in the present tense leaving nothing further to be done. In the latter respect, it is clearly distinguishable from the situation existing in *G. Amsinck & Co.* v. *Springfield*

Grocer Co. (supra), on which the Government chiefly relies (Gov't Brief, pp. 11-13). There the term "judgment accordingly" in light of other facts in the case was interpreted to be prospective in time and not a present judgment of the court. Here the term "The demurrer to the indictment *is* sustained" (Italics ours) cannot by any conceivable argument be regarded as looking to the future. It is specifically expressed as a present action and the only action that it could be was the District Court's decision sustaining the demurrer.

As an appeal statute is under consideration the words "decision or judgment" in the Criminal Appeals Act are used in the sense of *final decision* or *final judgment,* with respect to the subject matter of the appeal. On an appeal under the Criminal Appeals Act the whole case is not open to review in this Court, but only that part involving the invalidity or construction of the statute upon which the indictment is founded, *United States* v. *Keitel,* 211 U. S. 370. In this respect an appeal under the Criminal Appeals Act differs from the ordinary appeal where the whole case is open to review and an appeal cannot be taken except from a final decision, decree or judgment which settles all points in litigation between the parties and permits no further judicial action by the lower court.

With this distinction in mind, it follows that a case under the Criminal Appeals Act has reached an appealable status when the District Court has sustained

a demurrer because of the invalidity or construction of a statute and the action of the Court has been filed by the Clerk. Any orders or decrees that the District Court might thereafter make, either at the instance of the Government or otherwise, would not affect the appealable status of the case or the running of the time for appeal. That there may be orders or decrees of the District Court after the case is ready for appeal, is contemplated by the Criminal Appeals Act which provides that "Pending the prosecution and determination of the writ of error (now appeal) in the foregoing instances, the defendant shall be admitted to bail on his own recognizance." Under this provision the District Court may make an order admitting the defendant to bail after it has rendered its decision on a demurrer. The order of April 14, 1936, entered by the District Court was presumably in accordance with this provision. The appellee is a corporation which of necessity was not in custody and therefore could not be admitted to bail on its own recognizance. However, it could be "discharged without day," which the District Court did in its action of April 14, 1936 (R. 4).

That part of the action of April 14, 1936, which reads "the Demurrer to the Indictment in the above entitled cause be and the same is hereby, Sustained" did not add anything which was not already in the record of this case. The words used are similar in substance to those used by the District Court on March 11, 1936, when it said, "The demurrer to the

indictment is sustained." To conclude that this part of the action of April 14, 1936, is the decision or judgment sustaining the demurrer is not only to overlook and nullify similar words used by the Court on March 11, 1936, but is to say that in each succeeding order, which the District Court may enter in a case, appropriate words may be inserted which again decide the case and start a new period for taking an appeal. Such a conclusion is clearly untenable.

Not only is the foregoing construction of the District Court's action of March 11, 1936, the only reasonable one, but it was the one adopted by the Government itself. The Government petition for appeal (R. 5) states "that on the 11th day of March, 1936, a demurrer * * * was by the Court sustained" and asks for leave to appeal "for a reversal of said judgment and order." The order allowing the appeal (R. 5) was based on this petition. Whether inadvertent or not from its standpoint, this shows the natural interpretation of the District Court's action on March 11, 1936, and the Government's present argument that this was only a clerical error seems one adopted by necessity and not through a logical consideration of the entry.

It follows that the District Court rendered its decision or judgment sustaining the demurrer on March 11, 1936, and the Government appeal taken on April 14, 1936, was not within the 30 day period allowed. On this ground the appeal should be dismissed for lack of jurisdiction.

II.

The Standard Container Act of 1928 Properly Construed has no Application to the Manufacture or Sale of a Two-Quart Metal Hamper for Fruits and Vegetables.

The indictment charged in substance that appellee committed a criminal act both in manufacturing and in selling two-quart metal hampers for fruits and vegetables. No charge was made that such hampers were deceptive in shape or appearance, that they were not of full two-quart capacities, or that they were made for the purpose of sale or sold in interstate commerce. The Government's position succinctly stated is to the effect that no two-quart hamper for fruits and vegetables may be made or sold for use in the United States, and to do either constitutes a federal offense.

We venture to suggest that the bald statement of the Government's position would shock any impartial hearer and that it would be difficult for anyone to believe that it could be a crime against the United States Government to make or sell a full capacity two-quart hamper for fruits and vegetables. Any such contention so restrictive on individual liberties must be carefully scrutinized to see if it necessarily results from the legislation on the subject and if so whether it is permitted by the Constitution. It is submitted that the pertinent legislation provides for no such drastic prohibition and that the District Court was correct in so holding.

In considering the Standard Container Act of 1928 (Gov't Brief, Appendix A, pp. 35-41) the provisions of the Standard Container Act of 1916 (Appendix, *infra,* pp. 24-27) should be noted for their bearing on the questions here raised. This 1916 Act provided, *inter alia:*

> "SEC. 2: The standard basket or other container for small fruits, berries, and vegetables, shall be of the following capacities, namely, dry one-half pint, dry pint, dry quart, or multiples of the dry quart. * * *"
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> "SEC. 3: It shall be unlawful to manufacture for shipment, or to sell for shipment, or to ship from any State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, any Climax baskets or other containers for small fruits, berries, or vegetables whether filled or unfilled, which do not conform to the provisions of this subdivision of this chapter; * * *"

From the general plan of the two acts it can fairly be said that the 1916 Act dealt with the smaller containers for fruits and vegetables and was restricted to those used in interstate commerce, while the 1928 Act in specifically referring only to containers of four quarts and upward, was directed at the larger sizes and was not by its terms limited to those used in interstate commerce. That there was such general plan of covering the smaller containers by the 1916 Act and the larger ones by that of 1928, is demonstrated by the fact that the 1916 Act

was not only not repealed when the 1928 Act was passed, which would have been done had the latter been regarded as occupying the field for fruits and vegetable containers below the four-quart size, but the 1928 Act expressly exempted specified containers complying with the 1916 Act. This exemption has a real meaning for such containers approved by the 1916 Act as have capacities of over four quarts and thus fall within the express field of the 1928 Act, which fact eliminates any proposed conclusion that the 1928 Act must cover the field below the first size of four quarts mentioned in it in order to give the exemption any reasonable meaning.

Further support for this distinction between the 1916 and 1928 Acts and the contention that the latter was directed at the larger sizes only, is to be gathered from the general tenor of the documents set forth in the Goverment's Brief, Appendix B, pp. 41-59.[1] These show that the discussions over the 1928 Act centered around problems of shipping and deception, neither of which would have any application to the smaller sizes already regulated by the 1916 Act. It seems so apparent that this Court may reasonably

[1] In this connection it is interesting to note that of the many hampers shown in the photograph on p. 51 of the Government Brief as an example of the need of standardization, all lie within the express field of the 1928 Act from four quarts to two bushels with the exception of the five smallest ones at the upper left hand corner. It is impossible to read their capacities from the print, and no list is given, but it seems not unlikely that several at least of these may not be multiples of the dry quart, which would eliminate them under the 1916 Act. This photograph therefore presents a graphic picture of the field sought to be covered and of how little interest there could have been in regulating sizes below four quarts that already were reduced to multiples of the quart by the 1916 Act.

take judicial notice of it, that little if any shipping is done with such small containers as two-quart ones and that a two-quart container is not adapted for any but the smaller fruits and vegetables. And in two places at least specific statements bear out such distinction. In the report of the Chief of the Bureau of Agricultural Economics to the Secretary of Agriculture under date of September 11, 1929 (Gov't Brief, pp. 50 and 53), it was stated:

> "A much larger percentage of the samples of the *large* containers covered by the Act of 1928 have been found to be nonstandard than has been the case with the *smaller* containers covered by the Act of 1916." (Italics ours.)

Again, H. A. Spilman, Senior Marketing Specialist, Bureau of Agricultural Economics, Department of Agriculture, speaking of the 1916 Act, has said (Gov't Brief, p. 54):

> "As put together, its wording was such as to standardize also what we call till baskets and to indirectly affect *larger* containers." (Italics ours.)

Presumably the interstate commerce provision in the 1916 Act resulted from the fact that the smaller containers were regarded as of local concern except to the extent they were used in interstate commerce. The absence of such provisions in the 1928 Act indicates that the containers dealt with were not so regarded, because, as is borne out by the material found at pages 41-59 of Appendix B to the Govern-

ment Brief, the larger sizes more generally enter into interstate trade.

It follows that the 1928 Act was never intended by Congress to apply and does not apply in any way to containers for fruits and vegetables of less than one-eighth bushel (*i. e.* four quarts) and that a two-quart container, if within the field of federal law at all, is governed by the 1916 Act. No violation of the 1916 Act is here charged, not only because the described transactions are not within interstate commerce, but also because appellee's container complies with this Act in terms, being an accurate multiple of the quart.

To conclude otherwise is to put upon the 1928 legislation an unnecessary interpretation that leads to an absurd and arbitrary result. If the 1928 Act be regarded as applying to containers of less than four quarts in capacity, it is unlawful under the Government's contention to make or sell a two-quart hamper for fruits and vegetables, although lawful to make and sell a two-quart Climax basket, berry box or till basket for the same articles. This would be by reason of the express exemption set out in Section 5 of the 1928 Act (Gov't Brief, p. 38). Surely such a ridiculous distinction, based on the mere shape of a container, is to be avoided if it is possible to give the 1928 Act another reasonable construction. It can be given such reasonable meaning by restricting it to the larger size containers of four quarts and upward. As this Court has said in *United States* v. *Katz,* 271 U. S. 354, at p. 357:

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

The conclusion that the 1928 Act is not applicable to any container smaller than four quarts is further supported by the only decision of this Court relating to it. In *Pacific States Co.* v. *White*, 296 U. S. 176, 183, this Court in referring to the 1928 Act in question said:

> "That statute deals solely with hampers, round stave, and splint baskets of capacity not less than one-eighth bushel."

Perhaps the most significant thing about this statement, asserted by the Government to have been inadvertent and unnecessary to the decision in that case, is the fact that, presumably without being strongly urged on the point one way or the other, this Court adopted a natural and reasonable construction of the 1928 Act, without even a passing remark suggesting that there might be any other. It is submitted that it demonstrates rather concisely the fact that to no one would naturally occur the thought that the 1928 Act covered the field below the lowest limit set in it, particularly in view of the 1916 Act, and that the construction sought by the Government is indeed a tortured one.

III.

CONGRESS HAS NO POWER UNDER THE CONSTITUTION TO PROHIBIT THE MANUFACTURE OR INTRA STATE SALE OF APPELLEE'S TWO-QUART CONTAINER.

The Government, without discussion, attempts to dismiss the constitutional question that must inevitably arise in this case if the interpretation of the 1928 Act sought by it should be adopted (Gov't Brief, pp. 3, 4). If, as the Government contends, Congress has by the 1928 Act made it a crime to either manufacture, or sell intra state, a two-quart hamper for fruits and vegetables, it becomes a most pertinent question as to where in the Constitution Congress was given any such far reaching power. This constitutional question was specifically raised in the original demurrer to the indictment (R. 3), was argued by counsel in their briefs and oral argument before the District Court, and, although unnecessary to the latter's decision after it decided as it did that the appellee's two-quart hamper was not within the field of the 1928 Act, was covered in the District Court's opinion in the *Resnick* case by the statement that "we do not consider that there is any merit in such an objection" (*Resnick,* R. 7). The attempt of the Government to rely on the statement of the District Court that "The issue was so framed in this case that the constitutionality of the Act or the interstate character of the business is not involved" (Gov't Brief, p. 3), in view of the record and proceedings in the case, can better be explained by reluctance on

its part to meet the constitutional question than any real reliance on such an inexplicable statement of the District Court.

The only basis for the District Court's statement was appellee's contention, which is again advanced here, that a limitation of the field of the 1928 Act to the express limits specified in it from four quarts to two bushels does make unnecessary a decision on the constitutionality of the Act as applied in this case. And as was said in *Missouri Pac. R. R.* v. *Boone*, 270 U. S. 466, 471-2:

> "The section, if so construed, would, at least, raise a grave and doubtful constitutional question. Under the settled practice, a construction which does so will not be adopted, where some other is open to us. * * * An examination of the section in the light of the then existing federal and state law will make clear that another and reasonable construction is open to us, and that it should prevail."

But such principle does not cover the Government's argument that the 1928 Act is applicable to the facts in this case and it cannot, on the record here, evade the constitutional issue which its own contentions create, by any pretended reliance on the quoted statement of the District Court.

The 1928 Act is not confined in any way to transactions in interstate or foreign commerce, nor is such element present in this case. Accordingly the power of Congress to deal with the particular subject matter here must be found solely in the weights and measures

provision of the Constitution.[2] The power granted Congress in this field is found in the *Constitution, Article I, Section 8, Clause 5,* reading as follows:

> "The Congress shall have power * * * to * * * fix the Standard of Weights and Measures"

and the *Tenth Amendment* of course restricted Congress to such delegated powers as could be found in the Constitution.

There were no debates in the convention on this clause before its adoption, and this Court has never before had occasion to construe it.[3] The absence of all debate on the clause is a strong indication that no one questioned the wisdom of permitting Congress to set up one standard system of weights and measures for the entire country in the interests of free commerce so that every section could deal with every other on the basis of a common language of mass and amount. It is likewise submitted that had the delegates to the Constitutional Convention ever supposed that the language by which such desire was expressed might be fastened upon to permit the federal government then being created to make criminal

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[2] That the 1928 Act was regarded as based on the weights and measures provision, is indicated by the absence of any interstate or foreign commerce requirement in it, as well as by the fact that upon its introduction the proposed legislation was referred to the Committee on Coinage, Weights and Measures of the House of Representatives (Gov't Brief, p. 27).

[3] The Articles of Confederation of 1777, Article IX, had a similar provision reading as follows:

> "The United States in Congress assembled shall also have the sole and exclusive right and power of * * * fixing the standard of weights and measures throughout the United States."

the manufacture or intra state sale, of an accurate two-quart container, there would have been no lack of denunciation on the subject.

Congress has never adopted any general system of standard weights and measures[4] and it was not until the 1928 Act that the definition of the bushel was made (Gov't Brief, Appendix A, p. 36). Even here the definition was in terms of cubic inches and Congress has never adopted a standard of length. The reason for such inaction seems apparent, the English system of weights and measures was adopted generally in this country by common usage, there were no conflicting systems to interfere with it, and Congress was under no pressure to adopt a uniform system since one already existed in fact.

Now the Constitution does not give Congress the power to *regulate the use* of weights and measures, it only gives Congress the power to *fix the standard* of weights and measures.[5] Therefore, although Con-

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[4] Webster's New International Dictionary (1927) defines the words used in clause 5 as follows:

Fix—To give a permanent form to; to make definite and settled.

Standard—That which is established by authority as a rule for the measure of quantity, weight, extent, value or quality; esp., the original specimen weight or measure sanctioned by government, as the standard pound, gallon, yard, meter or the like.

Weight—A unit of weight or mass; as, a table of weights.

Measure—A unit of measurement, esp. a unit of length, area, or volume.

[5] It is significant that the first suggestion in the Constitutional Convention for a weights and measures provision appeared in a marginal note of Rutledge who proposed that Congress be given power "to *regulate* Weights and Measures," and that this was changed by the time of the final draft to read, "To * * * *fix* * * * the Standard of Weights and Measures." (Italics ours.) *William M. Meigs*, "The Growth of the Constitution," p. 140.

gress could rightly fix the standard of the quart or bushel as a measure of capacity, it is wholly outside its province to determine the extent or method of use of that standard by multiples or fractions, and *a fortiori* beyond the limits of its authority to regulate a *container* for any particular article. The 1928 legislation, if it be interpreted as attempting to prohibit the manufacture or intra state sale of a two-quart hamper for fruits and vegetables, is not the fixing of a standard of capacity but an invalid attempt to regulate a container.

It is agreed that it was desirable to have a uniform system of standard weights and measures in the United States so there would be but one standard dry quart and not a number of different ones which would result in confusion. But once having established a standard for the dry quart as Congress did in the 1916 Act (Appendix, *infra*, p. 25), it exhausted its power and was outside its field in attempting to prohibit the use of any multiple of that standard, irrespective of the beneficial purpose it may have thought it had in mind in attempting to do so.

It may be true that Congress, in being given the power to fix the standard, had the power to drive out other standards that conflicted with it so that there was but one dry quart measure and not a standard quart and a "Smith quart" for example. Even this is doubtful so long as a "Smith quart"

was so designated and not represented to be a standard quart, since Congress was given power to set up a common language for trade, but not given the express power to prohibit the use of any other. It is a far cry from this however to say that Congress could prohibit the use of a two-quart container that is a correct multiple of its own standard quart. The container here has no meaning as a measure apart from its relation and reference to the proper standard used.

Again, assuming for purposes of argument that it is within the power of Congress to prohibit containers which are not quite a quart in capacity so that confusion is apt to result, although this is by no means conceded for all purposes since it is not *fixing* a standard but *protecting* it, such power has no bearing on a direct prohibition against the use of an exact multiple of the standard, a full two-quart container.

The use of the term "standard hamper" in the Act is meaningless since it gives no measure of capacity. It is necessary to add "one-eighth bushel" or other reference to the known standards of capacity before any indication is given of size or amount. And by the same token, a "standard one-eighth bushel hamper" means a measure of capacity solely by reason of the use of the fraction of the bushel as a standard. The 1928 Act, if applied to the facts in this case as asked by the Government, would not be

the fixing of a standard, it would be an attempt to regulate a non-deceptive use of the standard under the guise of creating a new standard. It would indeed be a metaphysical argument to most people to be advised that a six-inch rule is a separate and distinct standard from a rule six inches long just because Congress chose to call it so. It must be concluded that, if the 1928 Act means what the Government says it does, new standards were not being fixed by Congress in the 1928 Act, but old standards were being used in new ways.

To the extent the 1928 Act for the first time defined the bushel and its fractions in terms of cubic inches it was a proper exercise of congressional power, but to the extent it attempted to set up permitted containers and abolish all others it was an invalid attempt to exercise a police power which Congress does not have. If the line of demarcation between *fixing* a standard and *regulating* its use, which appears so clearly in the 1928 Act, as sought to be applied by the Government in this case, is not firmly drawn, then there is no logical limit to the field in which Congress may regulate. Most articles of commerce are dealt in on the basis of weight or measurement, and the key to limitless regulation of local matters by congressional action has indeed been discovered if the innocent weights and measures provision means what the Government does not in terms, but must in fact, contend in this case.

CONCLUSION.

For the reasons given, it is respectfully submitted:

1. That the Government appeal should be dismissed for want of jurisdiction, or

2. That the action of the District Court in sustaining appellee's demurrer to the indictment should be affirmed.

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APPENDIX.

STATUTES INVOLVED.

The Standard Container Act of August 31, 1916, c. 426, 39 Stat. 673 as amended by Act of June 11, 1934, c. 447, 48 Stat. 930 (15 U. S. C. A. 251 *et seq.*) provides:

> SEC. 1. Standards for Climax baskets for grapes and other fruits and vegetables shall be the two-quart basket, four-quart basket, and twelve-quart basket, respectively:
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> (a) The standard two-quart Climax basket shall be of the following dimensions: Length of bottom piece, nine and one-half inches; width of bottom piece, three and one-half inches; thickness of bottom piece, three-eighths of an inch; height of basket, three and seven-eighths inches, outside measurement; top of basket, length eleven inches and width five inches, outside measurement. Basket to have a cover five by eleven inches, when a cover is used.
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> (b) The standard four-quart Climax basket shall be of the following dimensions: Length of bottom piece, twelve inches; width of bottom piece, four and one-half inches; thickness of bottom piece, three-eighths of an inch; height of basket, four and eleven-sixteenths inches, outside measurement; top of basket, length fourteen inches, width six and one-fourth inches, outside measurement. Basket to have cover six and one-fourth inches by fourteen inches, when cover is used.
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> (c) The standard twelve-quart Climax basket shall be of the following dimensions: Length

of bottom piece, sixteen inches; width of bottom piece, six and one-half inches; thickness of bottom piece, seven-sixteenths of an inch; height of basket, seven and one-sixteenth inches, outside measurement; top of basket, length nineteen inches, width nine inches, outside measurement. Basket to have cover nine inches by nineteen inches, when cover is used.

(d) The standards for Climax baskets for mushrooms shall be those set forth above, except that a one-pound Climax basket of the following dimensions shall be standard for mushrooms when plainly stamped or marked on the side of the basket with the words "for mushrooms only": Length of bottom piece, seven and three fourths inches; width of bottom piece, three and three sixteenths inches; thickness of bottom piece, three eighths of an inch; height of basket, three and five eighths inches; top of basket, length, nine and three eighths inches; width, four and three eighths inches; all outside measurements. Basket to have a cover four and three eighths by nine and three eighths inches when cover is used.

SEC. 2. The standard basket or other container for small fruits, berries, and vegetables shall be of the following capacities, namely, dry one-half pint, dry pint, dry quart, or multiples of the dry quart.

(a) The dry half pint shall contain sixteen and eight-tenths cubic inches.

(b) The dry pint shall contain thirty-three and six-tenths cubic inches.

(c) The dry quart shall contain sixty-seven and two-tenths cubic inches.

SEC. 3. It shall be unlawful to manufacture for shipment, or to sell for shipment, or to ship from any State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, any Climax baskets or other containers for small fruits, berries, or vegetables, whether filled or unfilled, which do not conform to the provisions of this subdivision of this chapter, or to use in any such shipment for any commodity other than mushrooms the one-pound Climax basket provided for in section 1 of this title; and any person guilty of a willful violation of any of the provisions of said subdivision shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined in any sum not exceeding $25: Provided, That nothing herein contained shall apply to the manufacture, sale, or shipment of Climax baskets, baskets, or other containers for small fruits, berries, and vegetables when intended for export to foreign countries when such Climax baskets, baskets, or other containers for small fruits, berries, and vegetables accord with the specifications of the foreign purchasers or comply with the law of the country to which shipment is made or to be made.

SEC. 4. The examination and test of Climax baskets, baskets, or other containers for small fruits, berries, and vegetables, for the purpose of determining whether such baskets or other containers comply with the provisions of this subdivision of this chapter, shall be made by the Department of Agriculture, and the Secretary of Agriculture shall establish and promulgate rules

and regulations allowing such reasonable tolerances and variations as may be found necessary.

SEC. 5. It shall be the duty of each district attorney, to whom satisfactory evidence of any violation of this subdivision of this chapter is presented, to cause appropriate proceedings to be commenced and prosecuted in the proper court of the United States for the enforcement of the penalties as in such case provided in said subdivision.

SEC. 6. No dealer shall be prosecuted under the provisions of this subdivision of this chapter when he can establish a guaranty signed by the manufacturer, wholesaler, jobber, or other party residing within the United States from whom such Climax baskets, baskets, or other containers, as defined in said subdivision, were purchased, to the effect that said Climax baskets, baskets, or other containers are correct within the meaning of said subdivision. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of Climax baskets, baskets, or other containers to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach in due course to the dealer under the provisions of this subdivision of this chapter.

CONSTITUTION.

The Constitution, Article I, Section 8, Clause 5, provides:

> The Congress shall have power * * * to * * * fix the Standard of Weights and Measures.

SUPREME COURT OF THE UNITED STATES.

Nos. 62 and 63.—October Term, 1936.

The United States of America, Appellant, vs. Charles Resnick and Joseph Resnick, Partners Trading as L. Resnick and Sons.	Appeals from the District Court of the United States for the Eastern District of Pennsylvania.
62	
The United States of America, Appellant, vs. The Acme Can Company.	
63	

[December 7, 1936.]

Mr. Justice Butler delivered the opinion of the Court.

Appellees were indicted for violations of the Act of May 21, 1928, 45 Stat. 685, 15 U. S. C., §§ 257-257i. In No. 62, the indictment is in four counts, each of which charges that defendants sold for fruits and vegetables two-quart metal hampers which did not comply with the Act in that they were not of any standard size authorized by the Act and did not come within any tolerance established by the Secretary of Agriculture. In No. 63, the indictment is in two counts. The first charges that defendant manufactured two-quart metal hampers that were not of any authorized size or within prescribed tolerances without having submitted dimension specifications to the Secretary. The second charges sale of them. In each case, the accused demurred upon the ground that the facts alleged are not sufficient to constitute a violation of the Act. The court sustained the demurrers and discharged the defendants. The United States appealed. 18 U. S. C., § 682.

Section 1 of the Act declares: "That the standard hampers . . . for fruits and vegetables shall be of the following capacities", and specifies nine sizes based upon a bushel of 2150.42 cubic inches. The sizes so defined are one-eighth, one-fourth, one-half, five-eighths,

three-fourths, one bushel, one and one-fourth, one and one-half, and two bushels. Computed according to the standard fixed, the capacity of a two-quart hamper is 134.4 cubic inches. Section 3 directs the Secretary of Agriculture to prescribe such tolerances as he may find necessary to allow in the capacities set forth in § 1. Section 4 commands: "That no manufacturer shall manufacture hampers . . . unless the dimension specifications . . . shall have been submitted to and approved by the Secretary of Agriculture, who is hereby directed to approve such specifications if he finds that hampers . . . made in accordance therewith would not be deceptive in appearance and would comply with" § 1. Section 5 makes it "unlawful to manufacture for sale . . . [or] to sell . . . hampers . . . for fruits or vegetables . . . that do not comply with this Act . . ." Anyone "that violates this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding $500."

The question is whether the provisions of the Act are effective to make the manufacture or sale of two-quart hampers punishable as a crime. The nine sizes standardized in § 1 are the only ones within § 4. The Secretary was not authorized by § 3 to prescribe tolerances in respect of two-quart hampers, and has not attempted to do so. The indictments must be construed to charge merely manufacture and sale of hampers each of capacity of two quarts, one-sixteenth of a bushel, 134.4 cubic inches. They do not charge that any such hamper purported to be of any size defined by § 1, or was in any respect liable to deceive. It follows that, unless the clause of § 5 which forbids manufacture or sale of containers "that do not comply with this Act" makes criminal the manufacture or sale of two-quart hampers, the facts alleged do not constitute any offense.

Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. *United States* v. *Wiltberger,* 5 Wheat. 76, 95. *Fasulo* v. *United States,* 272 U. S. 620, 628. The clause just quoted is crucial; its words are plain and, having regard to the connection in which they are used, must be given the meaning naturally attributable to them. It is obvious that they do not extend to hampers other than the nine classes defined in § 1. The Act applies to none of capacity less than four quarts. *Pacific States Co.* v. *White,* 296

U. S. 176, 183. It expresses no condemnation of two-quart hampers. Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses. *United States* v. *Lacher*, 134 U. S. 624, 628. *United States* v. *Chase*, 135 U. S. 255, 261. *Fasulo* v. *United States, supra*, 629. As in absence of governmental regulation the making and selling of containers is untrammeled, failure expressly to permit is not to prohibit. Mere standardization of a bushel container at 2150.42 cubic inches would not make criminal the manufacture or sale of a half-bushel container having capacity of 1075.21 cubic inches. The prescribing of capacities of containers described in § 1 does not prohibit manufacture or sale of the two-quart hampers described in these indictments.

The judgments sustaining the demurrers and discharging the accused must be affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 63

THE UNITED STATES OF AMERICA, APPELLANT

vs.

THE ACME CAN COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED MAY 15, 1936

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 63

THE UNITED STATES OF AMERICA, APPELLANT

vs.

THE ACME CAN COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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75336—36

1 In United States District Court, Eastern District of Pennsylvania.

No. 6665. June Term, 1935

UNITED STATES

vs.

THE ACME CAN COMPANY

For United States: Charles D. McAvoy.
For Defendant: J. A. Brown, J. J. Brown, S. B. Cooper.

Docket entries

1935
Sept. 11—True bill.
Sept. 13—Appearance of J. A. Brown, J. J. Brown, and S. B. Cooper for defendant, filed.
Sept. 26—Demurrer filed.
1936
Mar. 6—Argued sur demurrer.
Mar. 11—Opinion, Welsh, J., sustaining demurrer to indictment filed.
Apr. 14—Order of Court sustaining demurrer filed.
Apr. 14—Petition for appeal to Supreme Court of the United States filed.
Apr. 14—Assignments of error filed.
Apr. 14—Order of Court allowing Appeal filed.
Apr. 14—Statement of jurisdiction filed.
Apr. 14—Citation allowed and issued.
Apr. 14—Praecipe for transcript of record filed.
Apr. 22—Affidavit of service of copy of notice of appeal etc. filed.
Apr. 24—Statement of defendant against jurisdiction filed.
May 4—Stipulation of counsel amending statement of jurisdiction and order of Court approving stipulation filed.
May 6—Supplemental praecipe for transcript of record, filed.
May 11—Citation returned "Service accepted" and filed.

2 In United States District Court

[Title omitted.]

Indictment

Filed Sept. 11, 1935

COUNT I

The Grand Inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their oaths and affirmations, do present that heretofore, to wit: between the dates of December 20, 1934, and March 5, 1935, and divers dates theretofore and thereafter, at Philadelphia, within the Eastern District of Penn-

sylvania and jurisdiction of this Court, The Acme Can Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania and having its principal place of business at Philadelphia aforesaid, did knowingly, wilfully, and unlawfully manufacture a large quantity, to wit: 25,000, more or less, of two-quart metal hampers for fruits and vegetables, which said hampers then and there failed to comply with the Act of Congress of May 21, 1928 (45 Stat. 685, known as the United States Standard Container Act of 1928), in that they were not of any standard
8 size authorized by said Act for hampers for fruits and vegetables and did not come within the tolerances established by the Secretary of Agriculture pursuant to said Act for hampers so standardized, and in that said hampers were manufactured without having submitted the dimension specifications thereof to the Secretary of Agriculture and without having secured the approval of the said Secretary therefor, which facts said defendant then and there well knew;

Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

COUNT II

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do herein further present that heretofore, to wit: between the dates of December 20, 1934, and March 5, 1935, and divers dates theretofore and thereafter, at Philadelphia, in the Eastern District of Pennsylvania and within the jurisdiction of this Court, The Acme Can Company, a corporation organized as aforesaid, did knowingly, wilfully and unlawfully sell for use as containers for fruits and vegetables, certain two-quart metal hampers, to wit: 25,000 more or less, two-quart metal hampers, to L. Resnic and Sons, 232 South Front Street and 131 Dock Street, Philadelphia aforesaid, which said hampers then and there failed to comply with the Act of Congress of May 21, 1928 (45 Stat. 685, known as the United States Standard Container
4 Act of 1928) in that they were not of any standard size authorized by said Act for hampers for fruits and vegetables and did not come within the tolerances established by the Secretary of Agriculture pursuant to said Act for hampers so standardized, which facts said defendant then and there well knew:

Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

Charles D. McAvoy,
(Sgd.) CHARLES D. McAVOY,
United States Attorney.

PHILADELPHIA, PA., September 10, 1935.

6 In United States District Court

[Title omitted.]

Defendant's demurrer to indictment

Filed Sept. 26, 1935

And now, to wit, Sept. 26, 1935, comes The Acme Can Company, defendant in the within cause, by its Attorneys, John Arthur Brown, Joseph J. Brown and Stanley B. Cooper, Esquires, and demurs to the Indictment filed and to both counts thereof, and for grounds of demurrer assigns the following:

1. The manufacture of two quart metal hampers for fruits and vegetables, as alleged in Count I of the Indictment, is not a violation of the Act of Congress approved May 21, 1928 (45 Stat. 685).

2. The sale of two quart metal hampers for fruits and vegetables, as alleged in Count II of the Indictment, is not a violation of the Act of Congress approved May 21, 1928 (45 Stat. 685).

3. The Act of Congress approved May 21, 1928 (45 Stat. 685) applies to hampers for fruits and vegetables of the capacities set forth therein and does not apply to two quart hampers for fruits and vegetables.

7 4. When applied to the facts set forth in the Indictment, the Act of Congress approved May 21, 1928 (45 Stat. 685) is unconstitutional in that—

(a) Under the Constitution of the United States the Congress is without power to fix the size of hampers for fruits and vegetables that may be manufactured for sale or shipment or sold.

(b) Under the Constitution of the United States the Congress is without power to make unlawful the manufacture for sale or shipment or the sale of two quart hampers for fruits and vegetables.

(c) Under the Constitution of the United States the Congress is without power to fix the size of hampers for fruits and vegetables that may be manufactured for sale or shipment or sold in intrastate commerce.

(d) Under the Constitution of the United States the Congress is without power to make unlawful the manufacture for sales or shipment or the sale of two quart hampers for fruits and vegetables in intrastate commerce.

5. The enforcement of the Act of Congress approved May 21, 1928 (45 Stat. 685) would deprive the defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

8 Wherefore, defendant prays that this demurrer to the Indictment and to both counts thereof be sustained.

(Sgd.) JOHN ARTHUR BROWN,
(Sgd.) JOSEPH J. BROWN,
(Sgd.) STANLEY B. COOPER,
Attorneys for The Acme Can Co.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

L. F. GIEG, being duly sworn according to law, deposes and says that he is President of the defendant above named; that he is authorized to make this affidavit upon its behalf and that he is advised and believes that the Indictment is insufficient in law and that this demurrer is made in good faith and not merely for purposes of delay.

(Sgd.) L. F. GIEG.

Sworn to and subscribed before me this 25 day of September 1935.

[SEAL] (Sgd.) SEYMOUR S. BEERE,
Notary Public.

My Commission Expires Jan. 31, 1937.

9 In United States District Court

Opinion sur demurrer to indictment

Filed March 11, 1936

WELSH, J.: In view of the similarity between this case and that of the United States of America vs. Charles Resnick and Joseph Resnick, partners, trading as L. Resnick & Sons, June Term, 1935, No. 6688, the opinion filed March 11, 1936, in the latter case controls in this case.

The demurrer to the indictment is sustained.

10 In United States District Court for the Eastern District of Pennsylvania

No. 6665. June Sessions 1935

UNITED STATES OF AMERICA

vs.

THE ACME CAN COMPANY

Order sustaining demurrer

Filed April 14, 1936

And now, to wit: this 14th day of April, 1936, it is hereby Ordered that the Demurrer to the Indictment in the above entitled cause be, and the same is hereby, Sustained and defendant discharged without delay, to which the plaintiff excepts and the exception is allowed.

By the Court:

(S.) WELSH, *J.*

11 In United States District Court

[Title omitted.]

Petition for appeal to the Supreme Court of the United States

Filed April 14, 1936

Comes the United States of America, plaintiff herein and states that on the 11th day of March 1936, a demurrer of the defendant, The Acme Can Company, to each and every count of the Indictment herein was by the Court sustained, and the plaintiff feeling aggrieved at the ruling of said District Court in sustaining said demurrer, prays that it may be allowed to appeal to the Supreme Court of the United States for a reversal of said judgment and order, and that a Transcript of the Record in this cause duly authenticated may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause.

UNITED STATES OF AMERICA,
Charles D. McAvoy,
By (S.) CHARLES D. McAVOY,
United States Attorney,
Eastern District of Pennsylvania.

12 In United States District Court

[Title omitted.]

Order allowing appeal to the Supreme Court of the United States

Filed April 14, 1936

This cause having come on this day before the Court on the Petition of the United States of America, plaintiff herein, praying an appeal to the Supreme Court of the United States for a reversal of the judgment herein sustaining a demurrer of the defendant, The Acme Can Company, to each and every count of the Indictment in said cause, and that a duly certified copy of the Record of said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said motion, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is, therefore, by the Court Ordered and Adjudged that the plaintiff herein, the United States of America, be, and it is hereby allowed an appeal from the order and judgment of this Court in sustaining the demurrer of the defendant, the Acme Can Company, to the Indictment, to

13 the Supreme Court of the United States, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court.

It is further Ordered that the United States of America be, and it is hereby, permitted a period of forty days from the date hereof in which to file and docket said appeal in the Supreme Court of the United States.

Dated at Philadelphia this 14th day of April, 1936.

By the Court:

(S.) WELSH, *J.*

14 In United States District Court

[Title omitted.]

Assignment of errors

Filed April 14, 1936

Comes now the United States of America, plaintiff herein, by Charles D. McAvoy, United States Attorney for the Eastern District of Pennsylvania, and avers that in the Record proceedings and judgment herein there is manifest error and against the just rights of said plaintiff, in this, to wit:

1. That the Court committed material error against plaintiff in sustaining the demurrer of the defendant, The Acme Can Company, to each and every count of the Indictment.

2. That the Court committed material error against plaintiff in sustaining said Demurrer in holding that the provisions of the Standard Container Act of May 21, 1928, are inapplicable to the sale of two-quart size hampers for fruits and vegetables.

Wherefore, for all of the above information appearing on the face of the record proceedings and judgment herein, plaintiff avers that material error was committed prejudicial to it in this cause, and prays that judgment of the District Court be reversed.

Charles D. McAvoy,
(S.) CHARLES D. MCAVOY,
United States Attorney.

14a [Citation in usual form showing service on Stanley B. Cooper omitted in printing.]

15 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed April 14, 1936

To the Clerk, U. S. District Court, Eastern District of Pennsylvania:

The appellant hereby directs that in preparing the Transcript of Record of this cause in the United States District Court for the

Eastern District of Pennsylvania, in connection with its appeal to the Supreme Court of the United States, that you include the following:

1. Indictment.
2. Demurrer.
3. Opinion.
4. Judgment sustaining demurrer.
5. Petition for appeal to the Supreme Court.
6. Statement of Jurisdiction of Supreme Court.
7. Assignment of errors.
8. Order allowing appeal.
9. Notice of service on appellee of Petition for appeal, order allowing appeal, assignment of errors, and statements as to jurisdiction.
10. Citation.
11. Praecipe.

Charles D. McAvoy,
(S.) CHARLES D. McAVOY,
United States Attorney, Eastern District of Pennsylvania.
Counsel for Appellant.

15a In United States District Court

[Title omitted.]

Supplemental praecipe for transcript of record

To the Clerk U. S. District Court Eastern District of Pennsylvania:

The appellant hereby directs that in preparing the Transcript of Record of this cause in connection with its appeal to the Supreme Court of the United States, that you include the following:

Stipulation of counsel filed May 4, 1936.

Charles D. McAvoy,
(Sdg.) CHARLES D. McAVOY,
United States Attorney.

16 In United States District Court

[Title omitted.]

Stipulation re amendment of statement of jurisdiction

Filed May 4, 1936

And now, to wit: this 28th day of April 1936, it is hereby Stipulated and Agreed by and between Charles D. McAvoy, United States Attorney for the Eastern District of Pennsylvania, counsel for the plaintiff, and Stanley B. Cooper, Esquire, counsel for the defendant above named, as follows:

1. That the last paragraph on page two of the "Statement of Jurisdiction" be amended Nunc Pro Tunc to read as follows:

"The Indictment in this case is in two separate counts, each of which counts is based upon Sections 1 and 5 of the Standard Container Act of 1928 (United States Code Title 15, Secs. 257 and 257 (d), and charges in substance that the defendant, The Acme Can Company, on the days named, did knowingly, wilfully, and unlawfully manufacture and sell for fruits and vegetables, certain two-quart metal hampers which did not comply with the provisions of the Standard Container Act of May 21, 1928, in that they were not of any standard size authorized by the Act for hampers for fruits and vegetables and were not within any tolerances established by the Secretary of Agriculture pursuant to the Act for hampers so standardized. A Demurrer to the Indictment was filed by the defendant, The Acme Can Company, and at the hearing thereof the Court construed the provisions of the Statute as being inapplicable to the manufacture and sale of two-quart size hampers for fruits and vegetables. In its written opinion, the court held that the Act makes neither provision nor penalty for using a container of less than one-eighth (four quarts) of a bushel. The Court further held that the constitutionality of the Act was not involved and that the sustaining of the demurrer was not based on the intra-state character of the business."

17

2. That the second paragraph of the Assignment of Errors be Amended Nunc Pro Tunc to read as follows:

"That the Court committed material error against plaintiff in sustaining said Demurrer in holding that the provisions of the Standard Container Act of May 21, 1928, are inapplicable to the manufacture and sale of two-quart size metal hampers for fruits and vegetables."

This Stipulation is entered into without prejudice to the right of the defendant above named to question the correctness of the Statement of Jurisdiction as amended, or to object to the time within which the appeal was taken.

Charles D. McAvoy,
(Sgd.) CHARLES D. MCAVOY,
United States Attorney.

Stanley B. Cooper,
(Sgd.) STANLEY B. COOPER,
Attorney for Defendant.

Approved by the Court:
(Sgd.) WELSH, *J.*

18 [Clerk's Certificate to foregoing transcript omitted in printing.]

19 In Supreme Court of the United States

Statement of points relied upon and designation of entire record for printing

Filed May 20, 1936

Pursuant to Rule 13, Par. 9, of this Court, the Appellant states that it intends to rely on all of the points in its assignment of errors.

The appellant deems the entire record, as filed in the above entitled cause, necessary for the consideration of the points relied upon.

STANLEY REED,
Solicitor General.

Service acknowledged May 21, 1936.

JOHN ARTHUR BROWN,
Counsel for Appellee.

[File endorsement omitted.]

(Endorsement on cover:) File No. 40,590. E. Pennsylvania, D. C. U. S. Term No. 63. The United States of America, appellant, vs. The Acme Can Company. Filed May 15, 1936. Term No. 63 O. T. 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936